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CONVEYANCER'S NOTEBOOK

Town and Country Planning Act—Amendment of Use Classes Order and Development Charge Exemptions Order.—Following upon the relaxation of the General Development Order (noted, *ante*, p. 119) the Ministry have issued a new Use Classes Order (SI 1131/1950), and a new Development Charge Exemptions Regulation. We should be grateful that the amendments are not made by reference, but a complete new Order and set of Regulations have been issued. The changes are relaxations of the original stringency together with some desirable clarifications. So in Article 2 of the Use Classes Order " shop " is now defined to exclude " office " but to include " restaurant ", while " office " includes a " bank " but does not include a " post office ". There are now only eighteen instead of twenty-two Use Classes, and this has been achieved by linking up some of the classes, so, for instance, wholesale warehouses and repositories form one class and so do theatres, cinemas, music halls, dance halls, skating rinks, swimming baths, Turkish or other foam or vapour baths, gymnasia, or use for indoor games. It is useless to set out all these provisions, because it is necessary for practitioners to consult the actual Order. It will be borne in mind that the function of this Order is to govern the cases in which the existing use may be changed for another without requiring planning permission, etc. The importance, therefore, of the Order arises only where the present occupier or a purchaser or lessee wishes to make changes in the use of premises without involving " development ".

It is important to observe that under Article 3 (2) of the Order where " a group of contiguous or adjacent buildings used as

parts of a single undertaking" *includes* industrial buildings used for purposes falling within *two or more* of the Classes III–IX, these particular classes may in relation to that group of buildings and so long as the area is not enlarged be treated as a single class. In other words changes within the particular classes can be made in any of the buildings. Obviously this is a convenience in changing round uses in a group of buildings not all falling within one class.

The Development Charge Exemption Regulations are also by way of relaxation. Their provisions need very careful study in any particular case because it must be borne in mind that exemption from development charge does not imply freedom from the necessity of planning permission or, indeed, conversely. Article 3 of the Regulations brings out this point very forcibly. For example, the change of use from Class IV, that is general industrial building, to the use of Class III, light industrial building, does not involve development charge : Article 3 (4). Under the Use Classes Order such a change would be development, but in point of fact, under the General Development Order, 1950, First Schedule, Part I, Class III, there is a general planning permission given for such a change. Of course, either the exemption Regulations or the General Development Order could be revoked without the other. The point is that all three interlock and need consultation. This can be illustrated by reference to Article 6 of the Development Charge Exemption Regulations, which exempts from charge the erection, construction or maintenance or improvement of any building, shelter or enclosure (*other than* a dwelling, garage, stable loose-box or coachhouse) within the curtilage of a dwelling-house. This point does not fall within the Use Classes Order at all, since there is no change of Class, but under the General Development Order there is a general permission *provided that* the height does not exceed ten feet or, in the case of a building with ridged roof, twelve feet. This example is also of special interest from a conveyancing point of view, because of the exclusion of certain types of erection from the general planning permission and from development charge. It emphasises the importance of retaining a record of these uses where they exist and, of course, of any planning permissions, etc., where they come into existence.

One of the difficulties of these Orders lies in their exact interpretation. In some respects they are highly technical and there is little guidance. So, for example, there is no development charge for the use of any part of a dwelling-house as a shop provided the part has a floor space not exceeding two hundred square

feet and that such use " is combined with the residential use of the dwelling-house ". In difficult cases it will be necessary to decide (1) what is a " shop "; (2) what is floor space, *e.g.*, if there are stairs, whether it is the " tread " only that is measured or the floor space occupied by the stairs or what; and (3) what is a " residential purpose "; and (4) what is " combined with " for this purpose, *e.g.*, provided shop assistants live there, can the owner live elsewhere? No doubt this " village shop " type of case is not likely to present difficulties, but it is only typical of a problem that is aggravated by the fact that in questions of doubt the procedure provided is application to the Minister for a " determination " under section 17 of the Act. From this determination there is no appeal to the Courts provided for, though it is manifestly a question of law. If the applicant did not approve he could go on with the " development " and then, if served with an enforcement notice, appeal to the Court.

In our view, both the methods of definition by Order and the methods of settling disputed questions need revision. In the meantime practitioners are left with the necessity of studying the Orders in each individual case.

Planning Reports.—An indication of the new position of Planning Law is the issue of a set of Planning and Compensation Reports (published by Sweet & Maxwell, Ltd. at £1 15s. per volume). It is not intended at this stage to issue the parts at particular intervals, but at such intervals " as are necessary to ensure that the subscriber has available at all times a complete set of reports on this subject ". Two parts have so far been issued and include reports or notes of High Court cases and decisions of the Lands Tribunal. It is also intended to include planning appeal decisions given by the Minister of Town and Country Planning and proceedings before the magistrates. The ambit of these reports shows the diverse sets of decisions that affect the subject-matter. Not all of these can be called matters of law, since, for example, the Lands Tribunal decisions may essentially be a matter of valuation practice and several of the decisions reported in Part II of these Reports are made by members of the Tribunal who are not lawyers. It is proposed in this Journal to note those cases which are essentially of conveyancing significance. The relation between the valuation as distinct from legal problems is sometimes very close indeed, but on the whole the line seems to fall clearly and, in our view, the function of the lawyer as such is

limited to the problem of law. This does not mean that the question of value can be ignored. In our opinion it is so vital that the legal possibilities affecting value must always be borne in mind. In *Earl Fitzwilliam* v. *Minister of Town and Country Planning*, [1950] 2 All E. R. 765, a compulsory purchase order was made by the Central Land Board, because a lessor was only prepared to grant a building lease for 300 years at a pre-1947 ground rent, the lessee bearing development charge and getting any benefit of the claim in the " global sum ". In other words the lessor, after the Appointed Day, proposed that the lessee should bear any loss under the 1947 Act and not the lessor. The lessor applied to have the compulsory order quashed on the ground that the Board had no power to acquire land to enforce sales of land at " existing use " values. Birkett, J., upheld the Order. The significance of this decision is difficult to overestimate, if it stands. It seems to enable the Central Land Board to make " test " purchases to show the state of the market and this may have a considerable effect upon land values. But more importantly the number of compulsory purchases from one cause and another is so considerable that a purchaser who pays more than " existing use value " is in substantial danger of losing considerable sums of money. We would say that the danger is far less remote than that a defective title should give rise to an action by a person claiming by an adverse title. Furthermore, upon a compulsory purchase the question may arise of the onus of proof of the " existing use ". Presumably it will be open to the acquiring authority to challenge the alleged existing use if the authority can show that it is unauthorised—but the question may go deeper than this. Meantime purchasers are facing unpleasant alternatives, if the policy of compulsory acquisition to maintain " existing use " values is maintained.

Leasehold reform.—The Final Report of the Leasehold Committee (Cmd. 7982) has now been published (price 4s.). It is an elaborate report, even excluding the minority reports, running to 118 pages and dealing with a variety of topics. The two major problems discussed are leasehold enfranchisement and protection for tenants of business premises. In both these cases the majority Report is essentially conservative. It is of opinion that a general provision enabling tenants compulsorily to acquire the freehold is undesirable, and that, though it is desirable, it is impractical to make compulsory a " first refusal " in favour of the lessee if

the lessor intends to sell. On the other hand the Report does favour the extension of the protection of the Rent Acts to ground lessees and some measure of income tax relief in respect of premiums on leasehold redemption policies. Similarly, the majority are of opinion that it is neither desirable nor practicable that the rents charged for new lettings of business premises should be controlled, or that tenants should be given the automatic security of tenure afforded by the Rent Acts, but on the other hand recommends that the provisions of the Landlord and Tenant Act, 1927, should be strengthened with the emphasis on renewal and compensation as a secondary remedy.

If these recommendations are carried out we think that they will increase the tendency for building investment to be made in business premises rather than in building estates in the old sense. No doubt this will conform with the present policy of the Ministry of Health which so severely limits private building of houses. It has hitherto been assumed that this was a temporary measure in the present housing shortage. But, if the landlords of business premises are to be economically in a much more flexible position, the experience of the last thirty years is likely to increase the present tendency to invest only in business premises. It is felt that before the authorities proceed to extend the statutory protection of tenants of dwelling-houses without corresponding extension in the case of business premises this problem should carefully be weighed. The Committee also considered a number of other matters, particularly the problem of repairs and improvements, and the terms to be incorporated in a lease in the absence of contrary agreement including the case of a weekly tenancy. Here the recommendations were miscellaneous, but one of them receives our most wholehearted support, namely, that the statutory provisions should be consolidated and the existing miscellaneous collection of provisions about leaseholds should be incorporated in one Act. Two other recommendations deserve mention, namely, that absolute covenants not to assign or not to change use should be construed as covenants not to assign or not to change use without consent, and, secondly, that section 84 of the Law of Property Act, 1925, which enables covenants to be modified or discharged should apply to leases originally granted for more than forty years.

These are only a few of the recommendations in this striking report. It is understood that steps are to be taken to implement some, if not all of it, and it behoves practitioners to consider the proposals when the Bill is presented in case representations should be made. It was a strong committee and much evidence was taken. Nevertheless, if it is accepted in anything like its entirety

some striking changes are likely to be made in the law and practice of conveyancing in connection with leaseholds.

Inquiries preliminary to contract.—Two articles have appeared in our contemporary, the *Solicitors' Journal* (Vol. 94, at pp. 332, 350) on the subject of inquiries preliminary to contract arising out of a letter asking if some form of contract could not be devised to prevent much work which might prove abortive because no contract was signed. The learned contributor points out that these preliminary inquiries result largely from modern statutory provisions affecting land as well as the increase of registered incumbrances of which the purchaser may be deemed to have notice under section 198 of the Law of Property Act, 1915 : *Re Forsey and Hollebone's Contract*, [1927] 2 Ch. 379. With regard to the last point the learned writer suggests that section 198 should be amended to exclude notice before contract. This suggestion seems fundamentally sound, and it appears to us that the statute should require the disclosure by the vendor of all matters registered as land charges or local land charges.

In our opinion the growth of preliminary inquiries in their present form is due to a variety of other causes. Preliminary inquiries are no new thing. In the years before 1926 it was the custom, at any rate in London, for contracts by private treaty to be drawn up for each case, and such contracts usually contained only a few common form clauses. Conditions appropriate to auctions would frequently be struck out on the ground that they were not appropriate to contracts by private treaty. At the same time any conditions about easements, etc., always resulted in an inquiry in the margin whether such easements existed. And similar questions would be asked in the margin arising out of other clauses. Owing to the doubts and complexities arising in the early years of the 1925 legislation it has become the practice to use the full form of general conditions of sale (irrespective of whether the sale is by auction) which are printed so closely that the old form of marginal inquiry is impracticable. We think that there would be much to be said for a return to the old practice if the exigencies of time permitted. This would involve more careful consideration of what clauses were essential and this would automatically limit the number of preliminary inquiries.

Both these changes would still leave the necessity for preliminary inquiries, for instance, whether or not the premises were within the Rent Acts or whether notices or orders had been served

or made under the Agriculture Act, 1947. It would also leave outstanding the major bugbear of the Town and Country Planning Act, 1947. As the learned writer points out this particular problem depends in large measure upon whether or not the land is sold on the footing of a specified use under the Law Society's Conditions or the National Conditions. If it is sold on the footing of a specified use most of the preliminary inquiries fall, and this particularly would be the case if local land charges had to be disclosed, because most collateral obligations, such as tree preservation orders or development charge charged on the land, must be registered.

In our view, the practical position as it stands today without statutory amendment could best be met by applying the principle adopted with regard to the " use " in the Law Society's Conditions to all matters requiring registration if not disclosed and, in the case of agricultural land, to any notices or orders under that Act if not disclosed. This would not dispose of preliminary inquiries, but it would materially limit them, and, in our view, would not cast upon the vendor an unreasonable burden, since after all he should be aware of the obligations affecting his land. At the same time while it still remains a " seller's market " we doubt whether this practice is likely to gain much ground.

Assignments of Development Value.—The Central Land Board has announced that it will not apportion a claim made for depreciation of development value between owners of two or more parts of land in respect of which a single claim has been made. So, if the vendor of part of land subject to a claim purports to assign the proportionate part of the claim to his purchaser difficulty will arise. It is obvious that the proportion is not necessarily in the ratio of acreage, because either the part sold or the part retained may have a greater value for development.

The assignment of the right to part of a payment may relate (i) to a specified fraction of the payment, or (ii) to a specified amount out of the payment, or (iii) to an area forming part of the whole area included in the claim. But whatever form the assignment takes the parties will have to agree between themselves and advise the Board how the payment is to be made.

The Council of the Law Society (*Law Society's Gazette*, Vol. 47, No. 7) has expressed the opinion that it is the duty of the assignee's solicitor to give notice to the Central Land Board of any assignment.

DUTY OF TRUSTEES FOR SALE TO OBTAIN THE BEST PRICE

By E. H. Bodkin, Barrister-at-Law

The proper course to be pursued by trustees for sale in order to obtain the best possible price when there are several prospective purchasers is a matter of the greatest practical importance. The available authority is somewhat scanty, though the older cases indicate plainly the principles to be applied. Each case, as Wynn-Parry, J., observed in the recent case of *Buttle* v. *Saunders*, [1950] 2 All E. R. 193, must of necessity depend on its own facts, and this no doubt accounts for the small number of reported cases. The clear statement of the law by the learned Judge in the above case will be welcomed by trustees and those concerned with the conduct of negotiations on their behalf.

The general principles governing sales by trustees were laid down by Sir John Leach, V.-C., in *Ord* v. *Noel*, 5 Madd. 433, in the following terms: "Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price; and that in execution of their trust they will pay equal and fair attention to the interests of all persons concerned. If trustees, or those who act by their authority, fail in reasonable diligence; if they contract under circumstances of haste and improvidence; if they make the sale with a view to advance the particular purpose of one party interested in the execution of the trust at the expense of another party, a Court of Equity will not enforce the specific performance of the contract, however fair and justifiable the conduct of the purchaser may have been".

In order to insure that the best price is obtained it is, as has been said, the trustees' duty to obtain competition. This of course is most readily done by putting the property up to auction; and now that the objection to sales by auction in war-time conditions no longer applies this may be the best course. But trustees have, and always have had, power to sell privately and they may prefer to put the property in the hands of an agent; or they may have knowledge that some person is prepared to make an offer for it. Such person may be himself a beneficiary, or be introduced and sponsored by a beneficiary, and the rule as to favouring one beneficiary at the expense of the others then comes into play. Even if

there is no question of undue favour, the trustees may feel disposed to prefer his offer to another, but it must be emphasised that they are not bound to accept it, nor exonerated from exercising their own judgment. In *Selbie* v. *Bowie* (4 Giff. 300; affd. 8 L. T. 372), Sir John Leach, V.-C., said he was not aware of any authority which established that where there were two offers equally advantageous, one of which was preferred by the *cestui que trust*, it was the duty of the trustees against their own opinion to accept it. This, be it observed, was only a dictum. In the earlier case of *Harper* v. *Hayes* (2 Giff. 210) (where the converse case of a beneficiary attempting to prevent a sale to another purchaser occurred), Sir John Stuart said that trustees for sale ought not to disregard the wish of a beneficiary except where the terms of the trust gave him no option. But on appeal Lord Campbell, L.-C., held that the fact of a purchaser of the interest of a *cestui que trust* forbidding the trustees to sell to a third person because he wished to purchase himself did not prevent them accepting that person's offer.

There is therefore no question but that trustees, provided they exercise their judgment *bona fide*, can exercise their trust by selling against the express wish of a beneficiary without committing any breach of trust or rendering themselves liable to censure. And if they honestly believe that it is to the advantage of the trust to accept or refuse a particular offer, even against the wishes of all the beneficiaries being *sui juris* the Court would not, it seems, hold them liable for any consequential loss as on a breach of trust. Even if the *cestuis que trust* are in a position to bring the trust to an end, so long as the property remains vested in the trustees it is not, where there are undivided shares, "at home" and they can only sell under a trust for sale and not as agents for the beneficiaries. (Section 26 of the Law of Property Act, 1925, which requires trustees holding on the statutory trusts, so far as consistent with the general interests of the trust, to give effect to the wishes of the persons beneficially interested in possession, or the majority of them, would seem to apply only to the decision to exercise the powers, and not to the acceptance of any particular offer.)

Similarly it is clear that the request of one beneficiary does not exonerate the trustees from liability, though the concurrence of all the *cestuis que trust* would in practice relieve them from all liability, as the latter would then be parties to the breach of trust (if any) and be estopped from suing for it.

The chief difficulty in applying the general principles arises when there are two or more purchasers in the market and neither

has yet signed a binding contract. It is generally the trustees' duty to communicate the rival offers to the other prospective buyers in order to force up the price. There is, however, a stage beyond which the trustees are not bound to go on forcing up the price, but may, as Wynn-Parry, J., observed in *Buttle* v. *Saunders*, *supra*, act on the proverb that a bird in the hand is worth two in the bush. Circumstances may arise in which they may even properly refuse a higher offer and proceed with a lower. Playing one purchaser up against the other may result in losing both; and the trustees must not forget that if this happens through their default they may be made liable for any loss on a resale (see *Taylor* v. *Tabrum*, 6 Sim. 281).

It is on this difficulty that the cases have turned; and to appreciate how the principles are applied in practice, it is worth considering the facts of the three chief cases in some detail. In *Harper* v. *Hayes*, *supra*, the defendant, the sole trustee for sale under a trust deed, had made an offer to sell the property to one Pearson for £6,000, subject to title, the offer to open for one week. This offer was accepted after the time limit had expired, so that neither party was bound. The plaintiff, being desirous of acquiring the property himself, bought up the interest of one of the beneficiaries, and offered the trustee £6,000, less the value of the share he had purchased. Notwithstanding a notice by the plaintiff not to accept Pearson's offer, the defendant signed a contract with the latter for £6,000. The plaintiff by his bill offered £7,000.

Sir John Stuart, V.-C., ordered the agreement with Pearson to be set aside, with costs against the trustee personally.

Lord Campbell, L.-C., on appeal reversed this order, on the ground that the purchaser had no written notice that the trustee had misconducted himself. He considered *Ord* v. *Noel*, *supra*, was only an authority that specific performance should be refused in such a case and the purchaser left to his remedy at law. The plaintiff's notice did not of itself prevent the defendant selling to Pearson. It was not made out that the sale to him was a breach of trust. It was urged that on receiving the plaintiff's offer, the defendant was bound to put up the property to auction or stir up further competition between him and Pearson. But it was inexpedient to sell by auction owing to a defect in the title, which would have entailed a depreciatory condition of sale. If the sale was to be by private treaty, he did not know it was improvident to accept £6,000, which the beneficiaries had already agreed was a fair price, although the plaintiff had offered the same. No higher offer was made by the plaintiff until his bill was filed, and the state of facts to be considered was that at the date of the contract. Both

Pearson and the plaintiff might have resiled and the defendant have been liable for a loss on a future sale.

Selbie v. *Bowie*, *supra*, was another case of rival offers. The plaintiff who was entitled to the testatrix's residuary estate subject to legacies and annuities wished her business, including the goodwill, stock-in-trade and premises, to be taken over by her late father's foreman. The latter had been dismissed by her and had set up a rival business. His firm offered to take the stock at a valuation and to rent or purchase the premises at a valuation. The trustees, however, desired to sell the business to a firm who had been in the service of the testatrix herself, and had made a similar offer, including an agreement to assist the executors in getting in the debts, of which they had exclusive knowledge. The plaintiff alleged that he had never been given an opportunity to make a better offer at a higher rent and including payment for goodwill.

He asked for an injunction to restrain the sale and for the trustees to be personally charged with loss by reason of the agreement to sell to the rival purchasers.

Sir John Stuart, V.-C., held that the trustees had acted *bona fide* and in a careful and proper manner and that their conduct could not be impeached. There was in fact no great disparity between the two offers and there might be an honest difference of opinion which was the most advantageous; moreover, there was a conflict of evidence as to the principal point of difference between them, *viz.*, payment for the goodwill. The evidence failed to support the contention that the trustees had not paid proper attention to the wishes of the plaintiff.

The negotiations in *Buttle* v. *Saunders*, *supra*, were somewhat tangled. The trustees had been negotiating for the sale of the property to a Mrs. Simpson. The price had been agreed at £6,000 and the only outstanding term was the payment of the trustees' costs. One of the plaintiffs, Canon Buttle, desired to purchase the property himself, and the trustees' solicitors on being pressed by him, wrote that if he made a better offer within forty-eight hours they would advise their clients to accept it. Before the time limit expired, Mrs. Simpson agreed to pay the trustees' costs. The trustees thereupon considered they could hardly withdraw, and so informed the Canon, who nevertheless made no further offer, though he continued to press them to sell to him. On the trustees' communicating to him their final decision to sell to Mrs. Simpson, Canon Buttle verbally offered £6,500, and this offer was passed on to Mrs. Simpson, who had by then signed her part of the contract, though contracts had not been exchanged. The trustees considered matters had now gone too far for them to withdraw, but suggested

she might be willing to give up the property on compensation being paid. On Canon Buttle threatening legal proceedings, the trustees told him they did not object to the matter being brought before the Court, but this would have to be at his expense.

An action was commenced by the plaintiffs (who were persons interested under the statutory trusts on which the property was held) claiming (*inter alia*) an injunction to restrain the sale. The trustees by their counterclaim asked for the directions of the Court, and alleged that they did not now intend to sell except as the Court might authorise.

Wynn-Parry, J., made an order on the claim that the trustees should pay the plaintiffs' costs and were entitled to be indemnified, both as regards these costs and their own, out of the proceeds of sale of the property. On the hearing of the counterclaim, his Lordship gave the trustees liberty to sell to Mrs. Simpson for £6,600, she being a serious purchaser and the price being the highest offered.

His Lordship said that although an owner who had gone some length in negotiating with a prospective purchaser might decide to close with him notwithstanding he received a higher offer, trustees were not vested with such complete freedom; they had an overriding duty to obtain the best price for their beneficiaries. "It would, however", said his Lordship, "be an unfortunate simplification of the problem if one were to take the view that the mere production of an increased offer at any stage, however late in the negotiations, should throw on the trustees a duty to accept the higher offer and resile from the existing offer. For myself, I think that trustees have such a discretion in the matter as will allow them to act with proper prudence. I can see no reason why trustees should not pray in aid the commonsense rule underlying the old proverb 'a bird in the hand is worth two in the bush'. I can imagine cases where trustees could properly refuse a higher offer and proceed with a lower offer. Each case must of necessity depend on its own facts".

In the instant case the trustees had proceeded on an incorrect principle, considering themselves bound by commercial morality, and did not probe Canon Buttle's offer as they should have done. This would not have involved much risk of losing Mrs. Simpson, who was an anxious purchaser. They should have told the Canon that in the circumstances he must submit to very stringent terms and bind himself at once to pay £6,500 on the terms of the draft contract with Mrs. Simpson. His Lordship had no doubt that he would have agreed and the matter been carried through. The trustees, however, acting perfectly *bona fide* maintained their

attitude, subject to the very important qualification that they would not object to having the directions of the Court if the matter was taken to the Court.

It is to be noted that in none of the above cases were the trustees held to have committed a breach of trust. In *Selbie* v. *Bowie*, *supra*, they were specifically held properly to have exercised their discretion. *Harper* v. *Hayes*, *supra*, only decided that there was no right to set aside the agreement as against the purchaser; but Lord Campbell seems to have thought that the trustee was not to blame for his conduct of the negotiations. In *Buttle* v. *Saunders*, *supra*, the trustees were not saddled with the costs; though possibly, if the contract with Mrs. Simpson had been signed, they might have been.

The fact that the Court has refused an order to set aside the agreement is not necessarily conclusive as to the possible liability of the trustees to the beneficiaries for breach of trust or as to their liability to pay damages to the purchaser. It is established by *Harper* v. *Hayes*, *supra*, that the proper course, in the absence of fraud to which the purchaser is a party, is to refuse specific performance and not to set the contract aside. But in such a case the purchaser can, if the contract is not carried out, recover damages at law against the trustees for being unable to obtain the property; though this is only so if he had no notice of the breach of trust. He cannot, however, recover damages for the loss of his bargain, but only such damages as are allowable under the rule in *Bain* v. *Fothergill*. This appears from the case of *Gas Light and Coke Co.* v. *Towse* (35 Ch. D. at p. 543). This case related to an option to renew a lease under a private Act requiring the best rent to be obtained, the rent fixed by the option not being in fact the highest obtainable when the renewal was to be granted. It is also of some guidance as to the tenant for life's position where the best price or rent has not been obtained as required by the Settled Land Act. See also *Wheelwright* v. *Miller*, 31 W. R. 912. In this case the trustees of the settlement would appear not to be liable for not taking proceedings to prevent the dealing (see Settled Land Act, 1925, sections 97 and 101). It remains to consider the right of the trustees to claim relief from personal liability when their conduct in regard to the sale is held to amount to a breach of trust.

The Court has always recognised the difficulties in which trustees may be placed in the conduct of the negotiations through no fault of their own. The omission of the trustees to obtain the directions of the Court was always a material consideration and was made one of the conditions of relief in the Judicial Trustees Act, 1896, which first gave the Court power to relieve them. But it may be

impossible to obtain such directions where there are rival offers. The modern practice of signing an agreement subject to contract may also be thought to have further loaded the scales against trustees, as it has increased the period during which they may consider themselves morally bound to a purchaser. Trustees may now be relieved under section 61 of the Trustee Act, 1925, if they have acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court. It seems clear that the section would apply both to an action by the beneficiaries for breach of trust and to the costs and damages recovered in proceedings by the purchaser (see *Perrins* v. *Bellamy*, [1898] 2 Ch. 521; [1899] 1 Ch. 797). Further it appears to follow from the above case that the fact that the trustees acted contrary to the express wishes of a beneficiary would not prevent the Court considering that they ought "fairly to be excused". It is always open to a beneficiary to move for an injunction to restrain the trustees, and if they do not do so they must take the risk of the Court exercising its power to relieve them. In the above case the question was not as to the propriety of accepting an offer; the trustees had no power to sell at all.

In conclusion trustees may perhaps derive some comfort from the saying of Lord Justice Selwyn that it is "the main duty of a trustee to commit judicious breaches of trust".

THE FINANCE ACT, 1950

A Commentary

By Desmond Miller, Barrister-at-Law

The Act, which received the Royal Assent on July 28, 1950, effects no major changes in the existing law.

Part I, relating to Customs, Excise and Purchase Tax, is not included in the scope of the commentary, the remaining provisions are dealt with in some detail in the pages following.

(1) Income Tax and Surtax

The material sections are contained in Part II of the Act, *viz.*, sections 22 to 35, and as to the construction of these provisions section 50 (3), *ibid.*, provides :

> " Part II of this Act shall be construed as one with the Income Tax Acts."

The principal changes in the law are comprised, first in section 26, which nullifies the effect of the decision in *Beak* v. *Robson*, *infra*; sums paid as consideration for a restrictive covenant relative to an office or employment are in future to be chargeable to surtax—note the method of arriving at the figure paid—the measure is retrospective to the year 1949–50, but there is complete exemption for covenants given before April 6, 1948, and a limited exemption to certain classes of contract made in (or reduced to) writing before April 18, 1950.

Secondly, sections 30 to 35 set out to " restate and clarify the rules for income tax payable by husband and wife ". Rule 16 of the General Rules is repealed and replaced by section 30 which authorises collection of the tax referable to the wife's income from the husband, so long as she is " a married woman living with her husband "; the terms are defined by section 34 and the difficulty as apparent by the decision in *Nugent-Head* v. *Jacob*, *infra*, can no longer arise, nonetheless the position is still not free from ambiguity. The further amendments under this heading appear by section 32, which authorises the collection from the wife of income tax or surtax assessed on the husband being properly attributable to her income, in the case of assessments made for 1950–51 or subsequent years, and section 33, which enables a husband to disclaim liability

for tax on his deceased wife's income; as a consequential amendment the Revenue's right of recovery over against the husband under section 171 of the Income Tax Act, 1918, has been repealed.

Income tax and surtax remain at their present levels but there are minor concessions in the sphere of reduced rate and age reliefs.

(2) Miscellaneous Provisions as to Income Tax and Other Taxes

The seven sections in Part III of the Act, *viz.*, sections 36 to 42 and Sixth Schedule are in truth a miscellaneous collection; they are to be construed as follows, *vide* section 50 (4);

> "Part III of this Act so far as it relates to income tax, shall be construed as one with the Income Tax Acts, and so far as it relates to other taxes shall be construed as one with the enactments relating to those taxes respectively."

The main changes in the law are comprised in section 36 which affords a substantial measure of unilateral relief from foreign taxation in cases where no Convention exists between the country in question and the United Kingdom, section 38 which puts associations formed for scientific research, which may facilitate an extension of trade, in the same position as charities vis-à-vis relief or exemption from tax and stamp duties, and section 41 which extends a measure of relief where foreign exchange restrictions render the remission of income to the United Kingdom impossible; in these circumstances where the Commissioners, by concession, permit tax to stand over, interest (if any) on such tax is remitted.

The Chancellor's undertaking consequent on the decision in the *Oxford Group* v. *C. I. R.*, *infra*, has been implemented, by section 37, and in fact enlarged, as the time for amending the constituent documents is to be extended at the Commissioners' discretion. The treatment of enemy debts, which has caused some difficulty in practice, is now clarified, but the provisions of section 40 extend what appears to be a quite unwarrantable liability to assignees of such debts.

(3) Estate Duty

The relevant provisions are contained in Part IV of the Act, sections 43 to 48 and Seventh Schedule, by section 50 (5), *ibid.*;

> "Part IV of this Act shall be construed as one with Part I of the Finance Act, 1894."

Sections 45 and 48 dealing respectively with dispositions by tenants in possession of Parliamentary Settled Estates, and exemption from duty in the case of objects of national, etc.,

interest, require no general comment. The remaining sections so far as one can gather owe their origin to two recent decisions of the Courts, *viz.*,

Sections 43 and 44—*Att.-Gen.* v. *St. Aubyn*, *infra.*

Sections 46 and 47—*Re Earl FitzWilliams Agreement*, *infra.*

in that they are specifically occasioned by "loopholes" so-called, disclosed by those decisions. The statement is not perhaps strictly accurate in the case of section 44, but whatever the origin, it appears reasonably clear that a new and onerous burden has thereby been placed upon trustees.

The sections are themselves difficult of construction and are not rendered the less so by the frequent incorporations whether expressly or by reference from the extremely complex provisions of Part IV of the Finance Act, 1940. The following observation made during the Committee stages of the Bill (*Hansard*, Vol. 476, No. 61, col. 964, Sir William Darling) is not perhaps inapposite :

> "It has already been remarked in this Debate that these Clauses are in the main unintelligible to lawyers and completely unintelligible to other hon. members. Clause 34 (section 43) seems to bear out that somewhat challengeable assertion."

INCOME TAX AND SURTAX

Sections 22, 23.—Charge of and Higher Rates of Income Tax

The charge of income tax and surtax for the current fiscal year. The rates are to remain unchanged.

Section 24.—Increase in Reduced Rate Relief and Consequential Alteration in Marginal Relief for Small Incomes

The scope of the reduced rate relief granted by section 40 (2) of the Finance Act, 1927 (as amended), and as extended to the wife's earned income by section 28 of the Finance Act, 1948, is to be increased. In future the first £50 (of taxable income) is to be charged at 2s. 6d. instead of 3s. and the next £200 at 5s. instead of 6s.

There is a consequential amendment to section 19 (2) of the Finance Act, 1935, dealing with marginal relief.

Section 25.—Relaxation of Conditions for Grant of Age Relief under the Finance Act, 1925, s. 15 (2)

The relief known as "age relief" granted by section 15 (2) of the Finance Act, 1925, is by virtue of the present amendment

to be accorded in respect of the year of assessment in which the taxpayer, or his wife, reaches the requisite age limit.

Section 26.—SURTAX TO BE CHARGED ON CONSIDERATION FOR CERTAIN RESTRICTIVE COVENANTS

The origin and purpose of the present section have been the subject of fierce and lengthy debate in press and Parliament alike, and this aspect may therefore be swiftly disposed of.

In 1942 the House of Lords, in *Beak* v. *Robson*, 25 T. C. 33, held that sums paid by a company to an employee in consideration of a covenant by the employee that subsequent to the termination of his employment he would not, within a specified period, engage in the business of coal exporter or coal merchant (the trade carried on by the company) within fifty miles of the company's principal place of business, were not assessable under Schedule E as a profit of office or employment. In 1945 the Court of Appeal in *Associated Portland Cement Manufacturers, Ltd.* v. *Kerr*, 27 T. C. 102, decided that such a payment by a company was of a capital nature and could not therefore be admitted as a deduction in computing the company's profit for income tax purposes.

There the matter rested until the Chancellor of the Exchequer on April 6, 1948, uttered his now famous warning as to the legislation which would be introduced to deal, if necessary retrospectively, with what were termed devices whereby remuneration could be secured in a non-taxable form; express reference in this context was made to "restrictive covenants on an individual's employment".

The foregoing is necessary to an appreciation of the present provisions, the question of merits is not material to our consideration.

As passed into law therefore the section extends to;

(a) an undertaking the tenor or effect of which is to restrict an individual as to his conduct or activities; and

(b) is given by the individual in connection with an office or employment which he holds, has held or is about to hold.

If these conditions are satisfied, and;

(c) as consideration for the undertaking, or its total or partial fulfilment, any sum is paid to the individual *or to any other person*, and

(d) such sum would not apart from the present section be subject to charge to tax

then the sum so paid is to be grossed with income tax at the standard rate in force at the time of payment, and the gross figure so arrived at will be treated as part of that individual's income

(whether paid to him or not, see sub-paragraph (c), *supra*) for the purpose of computing his liability to surtax.

Thus the *Beak* v. *Robson* decision, above referred to, has been effectively nullified; in addition the following miscellaneous points must be noted;

(i) for the foregoing purposes it is immaterial whether the undertaking is absolute or qualified, legally binding or not;

(ii) office or employment is defined by sub-section (5) as one the profits whereof are chargeable to tax under Schedule E;

(iii) where valuable consideration other than money is given for the undertaking the consideration must be valued, and it is that value which is treated as the " sum paid ", for the purposes of the section;

(iv) the *assumption* of an obligation to make over or provide valuable property, rights or advantages is not included in the term valuable consideration, " the *doing* of anything in or towards the discharge of such an obligation " is so included;

(v) where the individual concerned dies before payment of the consideration the section is to have effect as if the sum had been paid immediately before the death.

The section is applied to surtax for the year 1949–50 and subsequent years, and incorporates power to make such assessment or additional assessment as may therefore be necessary.

As a slight measure of concession to repeated pressure during Committee stages of the Bill, the proviso to sub-section (3) now exempts :—

(a) any such undertaking given before April 6, 1948, and

(b) sums paid under a contract in writing made before April 18, 1950 (or reduced into writing before that date) provided,

(i) the sum is or was paid at or after the time of retirement, in pursuance of express provision in the contract providing for the payment at or after that time, *or*

(ii) if the main purpose of the contract was the transfer of a trade or part of a trade or the transfer of a controlling interest in a body corporate, the sum is or was paid in pursuance of an express provision (in the contract) in that behalf.

Particulars necessary for the purpose of the section must be given—under sub-section (4)—by the person making the payment, to the Revenue, within one month after the end of any relevant

year of assessment, or within one month after the passing of the Finance Act, 1950, where the payment was made during the year 1949–50.

Section 27.—Payment for Wayleaves, etc., for Electric Lines

The practice whereby rent paid in respect of easements relative to electric, telegraphic or telephonic wayleaves has been treated as within the ambit of section 21 of the Finance Act, 1934, is, it has been suggested, of doubtful legal validity.

The present section applies section 21, *supra*, to such payments, with the result that the rent is chargeable under Schedule D and deduction of tax falls to be made by the payer as if the payment were of a patent royalty.

By exception, where the rent does not exceed £2 10s. per annum, the payer may, at his election, pay without deduction of tax, and in such case assessment will be made on the payee under Case III of Schedule D, unless the rent is assessed under Rule 21 of the All Schedules Rules (*i.e.*, where the rent was not paid by the *payer* out of a fund of taxed income).

The section is retrospective, *vide* sub-section (2), *ibid.* :—

"this section shall be deemed always to have had effect", subject, however, to the proviso that where before April 19, 1950, any payment of rent to which the section applies had been made without deduction of tax, the provisions of the section are not to affect the appellate proceedings specified by the proviso to sub-section (2), relative to the chargeability of that payment to tax.

Section 28.—Continuation of Period for which Mills, Factories Allowances May be Given

The special allowances for depreciation of mills, factories and other similar premises made by section 15 of the Finance Act, 1937, could at the taxpayer's election be continued until the year 1950–51; subject to the reservation that the allowance had been granted for the year 1945–46; *vide* section 7, the Income Tax Act, 1945.

The effect of the present section is merely to extend the optional period until the year 1955–56.

Section 29.—Contributions under Superannuation Act (Northern Ireland), 1949, not to Qualify for Income Tax Relief

Contributions by civil servants under Parts I or II of the Superannuation Act, 1949, do not rank for income tax relief under (*inter*

alia) section 32 of the Income Tax Act, 1918 : *vide*, section 49, the Superannuation Act, 1949.

The section puts civil servants employed by the Government of Northern Ireland in the same position, and is necessary as that Government has no power to deal with questions of taxation; the provisions are retrospective to the year 1949–50.

Section 30.—General Rule as to Income Tax on Husbands and Wives

The provisions of Rule 16 of the General Rules of the Income Tax Act, 1918, provided the statutory authority whereby assessment was laid on the husband in respect of his wife's income. The rule as construed by the House of Lords in *Nugent-Head* v. *Jacobs*, 30 T. C. 83, dealt with two contrasted situations : *per* Viscount Simon at p. 101;

> "Proviso (i) deals with the case where there has been no matrimonial rupture and the wife is living with her husband albeit that her husband for one reason or another is away from her for a considerable period of time. Proviso (2) deals with the contrasted case where there is a rupture in marital relations and the wife is living in the United Kingdom separate from her husband."

In the *Nugent-Head Case* there had been no rupture in the marital relationship, the husband had proceeded overseas on military duties on which he was engaged for the period of three years, the wife remaining in the United Kingdom. Assessment was made on the wife in respect of income arising from foreign possessions (and remitted to this country) to which she was entitled in her own right, but held on the facts, that proviso (2) to Rule 16, *supra*, was inapplicable and accordingly assessment could not be made on her.

The provisions of this Rule were the subject of some criticism, indeed it was referred to by Viscount Simon (at p. 101 of the above report) as a "crabbed and involved piece of legislation", and an attempt has now been made by sections 34 and 35 of the Finance Act, 1950, with which the present section is to be read, to clarify the whole position.

Thus Rule 16 is repealed (by section 35 (*a*)) and is replaced by section 30. By sub-section (1), *ibid.*

> "a woman's income chargeable to income tax shall so far as it is income for a year of assessment or part of a year of assessment during which she is a married woman living with her husband be deemed for income tax purposes to be his income and not to be her income".

Section 34, *infra*, lays down the circumstances in which a wife for this purpose is to be treated as living with her husband; in effect she will be so treated unless there has been a *de jure* or *de facto* separation of a permanent nature. It will be noted that the income can only be deemed the husband's income in respect of a period during which the wife is "living with" him. So soon therefore as this condition ceases, the income is to be treated as her's alone.

It is difficult to see why the proviso to the sub-section has been inserted; in any event it is declaratory only and does not appear to affect the position.

Sub-section (2) of section 30, provides for assessment in respect of income deemed to be the husband's under sub-section (1), *ibid.*, to be made on the husband or as the circumstances may demand, on his trustee, guardian, etc., but by exception income accruing to the wife from a partnership in which she is a member is still to be assessed in accordance with the provisions of Rule 10 of the rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918.

Sub-sections (3) and (6) require little comment; the various allowances specified, admissible in the case where there is earned income of the wife (assessable on the husband), are to be set off against that income. Note also that by sub-section (5), the present section is subject to the existing provisions enabling the spouses to demand separate assessment to income tax and surtax.

Finally, certain provisions of the Income Tax Acts require that income is to be deemed the income of a defined person and of no one else : cf. section 18 (1) of the Finance Act, 1936, and section 38 (1) and (2) of the Finance Act, 1938. Such income is nonetheless—by sub-section (4)—to be included in the wife's income, which may be treated as her husband's income, by virtue of section 30.

Section 31.—Consequences as Respects Personal Allowances of Exercise of Option by Husband or Wife for Separate Assessment

Rule 17 of the General Rules of the Income Tax Act, 1918, enables application for separate assessment to be made by husband or wife; section 25 of the Finance Act, 1920, and the proviso to sub-section (3) of section 15 of the Finance Act, 1925, regulate the apportionment of the reliefs between spouses where such an application has been made.

The latter sections are now repealed by section 35 (*b*) of the Finance Act, 1950, and replaced by section 31, *ibid.* The section

appears to have effected no change in the existing law, and to require no detailed comment. Note :

(a) that the total of the reliefs given to the husband and wife by way of personal relief is to be the same as if no application for separate assessment had been made;

(b) that the reliefs covered by the section, *i.e.*, the personal reliefs, are those defined by sub-section (6) of section 30 of the Finance Act, 1950;

(c) that relief in respect of life assurance is not apportioned, but is granted to the spouse who pays the premium, and in the case of child or dependent relative relief is granted to the spouse who maintains such person or persons;

(d) that the total of the reliefs allocated to the wife under this section is not to be less than she could have secured had no application for separate assessment been made;

(e) that where the total of the reliefs (in terms of tax) allocated to the husband, exceeds the income tax (excluding surtax) chargeable on the husband's income for that year, the balance is to be applied in reducing the wife's liability, and similarly in the case of the wife's reliefs.

Section 32.—Collection from Wife of Tax Assessed on Husband Attributable to Her Income

The provision is new and authorises the collection of tax assessed upon a husband, which is referable to his wife's income, from the wife. The section is not mandatory and its machinery is put into operation if and only if the Commissioners of Inland Revenue or, as the case may be, the Special Commissioners, in their discretion so decide; the operative wording is that they " may " serve the notice, which is the first step to shelving the burden onto the wife.

The conditions in which this notice may be served are specified by sub-section (1), *viz.*, where :

(a) assessment to income tax has been made *for the year 1950–51*, or any *subsequent year* on a man, or on his trustee, curator, or personal representatives, and,

(b) the Commissioners of Inland Revenue in the case of income tax, or the Special Commissioners in the case of surtax, are satisfied that had application for separate assessment (under Rule 17, the General Rules, or section 42 (9), the Finance Act, 1927), been in force with respect to that year assessment on the same income, or part of it, would have been made on the wife or on her trustee, etc., and,

(c) the whole or part of the amount assessed remains unpaid within twenty-eight days after the due date.

Where these conditions are satisfied notice may be served on the wife or on her trustee, guardian, etc., or if she be then deceased on her executors or administrators, giving (i) particulars of the original assessment; (ii) the amount remaining unpaid; and (iii) " to the best of the Commissioners' judgment " particulars of assessment which would have been made on her had notice requiring separate assessment been effective during the relevant year; *and*, *requiring payment* :

(1) of the amount remaining unpaid under the original assessment, *or*

(2) the amount due had separate assessment been made on the wife,

whichever be the less.

The effect of any such notice is that the tax thereby required to be paid ceases to be recoverable under the assessment originally made (on the husband), and further, provision is made (by sub-section (3)) for any consequential adjustment or repayment of interest on tax in arrear, due by virtue of the provisions of section 8 of the Finance (No. 2) Act, 1947.

Sub-section (2) of the section broadly speaking, and for the purposes of liability to and recovery of tax, priority in bankruptcy, appeals, and incidence of the duty, applies the provisions of the Income Tax Acts as if the notice were an assessment properly made on the day of service of the notice. As a result of amendment in Committee the wife is not now to be restricted in any way as regards the points she may wish to take on appeal against assessment, the proviso to sub-section (2), however, ensures that where appeal against the assessment originally made on the husband has been heard in whole or in part by the Special or General Commissioners, any appeal by the wife under the present section shall be made to the same body, *i.e.*, to the Special Commissioners if the husband's appeal was to them, or if to the General Commissioners then to the General Commissioners for the same Division.

Sub-section (5) grants enabling powers to the Revenue to obtain information for the purposes of the section.

There is one further amendment to the existing law to be read in conjunction with the present section, namely, the repeal of section 171 of the Income Tax Act, 1918 (by section 35 (*d*) of the Finance Act, 1950) : section 171, *supra*, reserved to the Crown the right of distraint on the husband's property—notwithstanding separate assessment—in the event of non-payment by the wife. As recourse can now be had directly to the wife, it is obviously no longer necessary to retain the power.

Section 33.—Right of Husband to Disclaim Liability for Tax on Deceased Wife's Income

The present section effects a further change in the existing law, essentially consequential on the provisions of section 32, *supra*, and enables a husband to disclaim liability for unpaid tax properly referable to his deceased wife's income.

The section will apply :

(a) where a woman dies,

(b) who, at any time before her death was a married woman living with her husband,

(c) there is unpaid income tax referable to income of her's,

(d) for a year of assessment or part of a year during which she was a married woman living with her husband.

Where these conditions are satisfied the husband or if he is dead, his executors or administrators, may serve notice on the wife's personal representatives disclaiming responsibility for the unpaid tax.

The essential distinction between the present provisions and section 32, *supra*, is that on service of the notice the Commissioners are *bound* to exercise their powers as to separate assessment; they have no discretion in the matter.

The effect of giving notice of disclaimer is that assessments for all relevant years are to be adjusted as if in respect of those years application for separate assessment on husband or wife under the provision of Rule 17 of the General Rules, or under section 42 (9) of the Finance Act, 1927, had been in force. It follows that on the application of these provisions, assessment can be made upon the wife's executors or administrators, subject, however, to the normal rules as to time for such assessment contained in section 29 of the Finance Act, 1923, *i.e.*, within three years of the end of the year of assessment in which the wife died.

There are several limiting features on the right, *viz.* :

(a) notice must be served within two months of the grant of probate or letters of administration in respect of the wife's estate—unless her personal representatives consent to an extension of the time;

(b) the notice must be in writing and must be served on the wife's executors or administrators and on "the surveyor"; as regards notice on the surveyor it will not be validly served unless it specifies the names and addresses of the wife's executors or administrators. (Note the definition of the term "the surveyor", for this purpose, contained in sub-section (4).)

Section 34.—CONSTRUCTION OF REFERENCES TO MARRIED WOMEN LIVING WITH THEIR HUSBANDS AND SPECIAL PROVISIONS AS TO CERTAIN SPOUSES GEOGRAPHICALLY SEPARATED

As indicated in the notes to section 30, *supra*, the present section is directed to the difficulties in the construction of Rule 16 of the General Rules becoming apparent in the case of *Nugent-Head* v. *Jacob*, 30 T. C. 83.

Under the law as it now stands a married woman will be treated for income tax purposes as living with her husband (the phrase is of great importance in the construction and application of sections 30, 32, and 33, *supra*) unless :

" (a) they are separated under an order of a Court of competent jurisdiction or by deed of separation "; or

" (b) they are in fact separated in such circumstances that the separation is likely to be permanent ".

The words " in such circumstances that the separation is likely to be permanent " raise an issue of fact in which presumably the question of a breach in the marital relationship will be one material factor only; although it is probably true to say that in determining whether a separation is or is not " likely to be permanent " evidence of a rupture of this sort coupled with *de facto* separation would conclude the matter.

It is necessary to stress the point as the section as drawn will apparently embrace circumstances where there exists factual separation without any antecedent rupture in the matrimonial relationship.

Sub-section (2) deals expressly with the circumstances which arose in the *Nugent-Head Case*. An example of the sort of circumstance to which the sub-section was intended to apply—given by the Solicitor-General in Committee—was that of two spouses, one working in the Colonies, one here; the proviso to the sub-section ensures that the operation of its provisions will not increase the aggregate income tax and surtax, which would otherwise have been suffered by the spouses.

MISCELLANEOUS PROVISIONS AS TO INCOME TAX AND OTHER TAXES

Section 36.—UNILATERAL RELIEF FOR DOUBLE TAXATION

The question of relief from foreign (*i.e.*, non-United Kingdom) taxation has been present to the mind of the public since the recent refusal of British firms to undertake the Colombo Harbour project on this very score; this factor coupled with the delay in completing reciprocal agreements under section 51 of the Finance (No. 2) Act,

1945, have caused the Government to introduce, as an interim measure, a system of unilateral relief.

The relevant provisions are contained in section 36 and the Sixth Schedule (to the Finance Act, 1950), and do not, on the face of it, present any prima difficulties in construction. It will therefore suffice for the purpose of this commentary, to indicate the principal features of the new relief.

(a) *The Relief.*

Relief from income tax and profits tax is to be given as regards tax payable under the laws of any territory outside the United Kingdom—in respect of income arising in that territory—by allowing such foreign tax as a relief against the income tax or profits tax chargeable in this country against that income.

The relief is such as would fall to be given under Part I of the Ninth Schedule to the Finance Act, 1947, if agreement relative to dual taxation under section 51, *supra*, had been concluded with the territory imposing that tax, with the proviso that the credit so given is not to exceed 75 per cent. in the case of Commonwealth countries, or 50 per cent. in the case of other countries of the limits specified in paragraphs 4 and 5 (1) of the Ninth Schedule to the Finance Act, 1947, *i.e.*, of the combined rates.

(b) *When available.*

The relief is restricted to persons resident in the United Kingdom (note the special provisions relative to the Channel Islands or Isle of Man) subject to exception in the case of employments chargeable under Schedule E where the duties are performed wholly or mainly abroad.

(c) *Restrictions on relief:*

(i) the relief can only be claimed in respect of foreign tax analogous to United Kingdom Profits Tax and Income Tax;

(ii) it cannot be claimed where agreement subsists with the Government of the foreign country in question, under Part V of the Finance (No. 2) Act, 1945, *supra*;

(iii) the relief is not applicable in the case of the Republic of Ireland, with which the pre-existing system of reliefs is to continue.

(d) *Miscellaneous* :

(i) Dominion Income Tax relief secured by section 27 of the Finance Act, 1920, is abolished;

(ii) note the definition of " the Commonwealth " territories contained in sub-sections (9) and (10);

(iii) the relief is to apply to income tax for the year 1950–51 *et seq.* and to profits tax for any chargeable accounting period ending after the end of March, 1950.

Section 37.—Extension of Charities Relief to Certain Bodies as Respects Past Periods

The reasons for these provisions are generally known, but it may be well at this stage to recapitulate them.

The relief from tax granted by section 37 of the Income Tax Act, 1918, is accorded to a body or trust "established for charitable purposes only"—as to the meaning of these words cf. *C. I. R.* v. *Pemsel*, [1891] A. C. 531—and under this section the relief was claimed by the Oxford Group. This Movement was at the material time a body corporate limited by guarantee and its Memorandum of Association contained (*inter alia*) the following objects :—

"(9) To establish and support or aid in the establishment and support of any charitable or benevolent associations or institutions, and to subscribe or guarantee money for charitable or benevolent purposes in any way connected with the purposes of the association or calculated to further its objects.

(10) To do all such other things as are incidental or the association may think conducive, to the attainment of the above objects or any of them."

The claim was rejected by the Court of Appeal, *Oxford Group* v. *C. I. R.*, [1949] 2 All E. R. 537 : so far as material to the present amendment of the law the *ratio decidendi* of that decision appears from the judgment of Cohen, L.J., at p. 543 (of the above report), *viz.* : "a trust which permits the expenditure of income on such subsidiary activities (*i.e.*, activities not being of themselves charitable) is not a good charitable trust".

His Lordship referred to the decision in *Chichester Diocesan Fund and Board of Finance* v. *Simpson*, [1944] A. C. 341, where a distinction was drawn between objects which are charitable and those which are benevolent, the latter being held to be non-charitable; and, with particular reference to paragraph (10) of the objects clause, *supra*, to *Dunne* v. *Byrne*, [1912] A. C. 407. In that case a testator had bequeathed a legacy to "the Roman Catholic Archbishop of Brisbane and his successors, to be used wholly or in part as such Archbishop may judge most conducive to the good of religion in the diocese". The gift was held invalid, *per* Lord Macnaghten at p. 410 :

"It can hardly be disputed that a thing may be conducive and in particular circumstances most conducive to the good

of religion in a particular diocese without being charitable in the sense which the Court attaches to the word."

Previous to the *Oxford Group Case* relief had been conceded by the Revenue to many charities whose constituent documents contained *ancillary powers* similar to those found objectionable by the Court in that case, and as a consequence the Chancellor of the Exchequer in a parliamentary reply given on December 1, 1949, undertook to introduce legislation which would ensure a continuance of the relief to those charities provided that the Memoranda and Articles were suitably amended prior to April 5, 1950.

The section as passed into law incorporates, with minor exceptions noted below, the precise and limited term of undertaking, thus by sub-section (1):

(a) if the charity were established before April 6, 1950, and;

(b) on that date, *or at such later date as the Commissioners allow*,

(c) was a body established "for charitable purposes only";

then the relief from income tax available to such charity will not be lost by reason only of the fact that its constituent documents contained provisions similar to those causing the difficulty in the *Oxford Group Case* (see the extracts numbered (9) and (10), *supra*).

It is perhaps unnecessary to add that in the generality (though this is not universally true, cf. *Oxford Group* v. *C. I. R.*, *supra*, *per* Cohen, L.J., at pp. 545–6) the inclusion in a Memorandum or other constituent document of such ancillary powers necessarily means that the charity does not satisfy the conditions required by law if it is to be treated as established for charitable purposes only; it therefore follows that these powers must, in their present form, be deleted, and if this was done either by April 6, 1950, or the Commissioners of Inland Revenue having granted an extension of time for the purpose, is now or hereafter effected, then the relief in jeopardy for periods prior to amendment will not be forfeited.

Note again that the sub-section is expressly limited to cases where the body in question failed to satisfy the legal requirements of a charity because its constituent documents contained the powers specified, the relevant words used are "by reason only".

Sub-section (2) applies similar conditions to any relief from Stamp Duties available to a charity.

Section 38.—Extension of Charities Relief to Certain Scientific Research Associations

The existing concessions as regards capital or income expenditure incurred for the purpose of scientific research, are contained in

Part IV of the Finance Act, 1944, as amended and extended by Part IV of the Income Tax Act, 1945. It will be appreciated that these provisions are directed to relieving the trader who incurs the expense, broadly speaking, from tax upon payments made for the purpose.

The present section is directed to placing *Associations* formed for the purpose of scientific research related to trade, in the same position as charities, vis-à-vis reliefs from tax and stamp duties.

There are stringent conditions to be satisfied thus :

(a) the Association must have as its object the undertaking of " scientific research " (as defined by sub-section (2)) which may lead to or facilitate an extension of any class or classes of trade;

(b) approval of the Committee of the Privy Council for Scientific and Industrial Research must be obtained;

(c) the Memorandum must prohibit the divisions of the Association's income or property by way of gift, dividend, *etc.* : note the proviso to sub-section (1) which excepts power to pay reasonable remuneration, interest on loans, or rent.

Application for relief must be made in accordance with the provisions of section 19 of the Finance Act, 1925, and if refused, the Association is to have the same right of appeal as would a charity under that section.

Section 39.—Treatment for Taxation Purposes of Enemy Debts Written Off During the War

Section 40.—Modification of the Last Preceding Section in the Case of Recoveries by Assignees and in Certain Cases of Subsidiary Companies

These sections are to be read together and briefly are to the effect that where recovery of an enemy debt previously written off is now (or in the future) effected, whether by the original creditor or by any assignee of the debt, assessments to excess profits tax, profits tax, and income tax in respect of the Excess Profits Tax period, are to be reopened and the necessary adjustments made. It will be common knowledge that the course of events during the last war resulted in the majority of such claims to " write off " being related to the year 1939–40, with an overlap to the year 1940–41, and further that sub-section (4) of section 39 summarises the position which in fact exists, again in the majority of these cases.

It is therefore reasonably accurate to say that section 39 summarises the existing position but not so section 40 which changes the law by throwing a potential burden on to the assignee of such a debt.

The sections are lengthy but present no difficulty in construction and it will therefore suffice to indicate the salient features, *viz.* :

Section 39 :—

(a) the accounting period in question must be one which ended during the period April 1, 1939, to December 31, 1946;

(b) in computing the profits or losses of the relevant trade or business, for excess profits tax, profits tax or income tax purposes in such period, a debt, claim or the value of the property must (whether in whole or part) have been treated as a deduction, or if not so treated the tax referable thereto have been allowed to remain outstanding;

(c) the debt or claim must have been owed by a person resident or carrying on business in a territory "under the sovereignty of, or in the occupation of a Power at war with His Majesty at some time during the years 1939 to 1946" (or by such a Power itself) or in the case of property, situated in such territory;

(d) recovery in respect of the debt, claim or property must be made, either by the original trade creditor or by "some person claiming through or under him";

(e) the amount recovered must be greater or less than the balance remaining after any permitted deduction.

Where these conditions are satisfied adjustment will be made by reference to the appropriate chargeable accounting period or year of assessment, as the case may be, and assessment or additional assessment or repayment of tax—as the facts warrant—will follow.

Sub-section (2) defines "recovery", and includes within its scope sums recovered under the Distribution of German Enemy Property Act, 1949, or as consideration for assignment of any debt, etc., treated as deductible; note also the provision for apportionment when the recovery relates to several enemy debts or claims. Sub-section (3) permits expenses incurred in obtaining recovery to be deducted from the amount recovered; the sub-section incorporates further provisions preventing any duplication of this relief, if it may be so termed.

Finally, it will be noted that there is, for the purpose of the section, no time limit for assessment or additional assessment.

Section 40 :—

(a) the section applies where the recovery is made either by the personal representative of the deceased trade creditor or an assignee of the debt, claim or property;

(b) in this case the payments or repayments required by section 39 are not to be made but the Commissioners may serve notice on the deceased's executors, the assignee (or his executors) requiring payment of such tax as may be due when adjustments have been made in accordance with section 39, *supra*;

(c) for the purpose of the Income Tax Acts such a notice is to be treated as if it were an assessment to tax properly made for the year of assessment current when the notice was served; (note that these purposes expressly include recovery, priority in bankruptcy and appeals);

(d) by the proviso to sub-section (2), the Commissioners—where the person making the recovery is not resident in the United Kingdom, or died resident abroad—may in their discretion serve the notice on, or on the executors of, "any predecessor in title of his in respect of the debt, claim or property in question, being a person who is resident in the United Kingdom or was so resident when he was last entitled to the rights in respect of the debt, claim or property in question to which the person making the recovery has succeeded."

Sub-sections (4) and (5) deal with the method of application of the foregoing provisions of the section, where there have been changes within groups of interconnected companies previously associated for the purpose of assessment to excess profits tax and profits tax respectively.

Section 41.—Remission in Certain Cases of Interest on Tax in Arrear by Reason of Exchange Restrictions

Section 8 of the Finance (No. 2) Act, 1947, authorises the charge of interest at 3 per cent. per annum on arrears of income tax under Schedule D, and on surtax, profits tax or excess profits tax, provided that the arrears exceed £1,000; the charge was to be operative from January 1, 1948.

The present section extends relief where the Commissioners are satisfied that income arising abroad cannot be remitted to the United Kingdom by reason of action on the part of the foreign Government concerned, and where they have in consequence

permitted the tax to remain uncollected. In these circumstances where such tax carries interest under section 8, *supra*, subsection (2) of section 41 provides that interest on the tax thus permitted to stand over shall cease to run from the date when the Commissioners were first in possession of information necessary to their decision to postpone collection of the tax.

The interest will again begin to run from the date of any subsequent demand for payment by the collector.

The section is retrospective but no interest paid before June 27, 1950, is to be repaid.

ESTATE DUTY

Section 43 (and Seventh Schedule).—Disposition or Determination of Life Interests

Section 43 of the Finance Act, 1940, preserves the Crown's right to duty on the death of a life tenant or annuitant whose interest was terminated within three (now five) years of his death, or outside that period if he retained or acquired some benefit or interest in relation to the transaction.

The expressed intention of the Government in promoting the amendment to that clause, contained in section 43 and the Seventh Schedule to the Finance Act, 1950, was first to remedy the position disclosed by the decision in *Att.-Gen.* v. *St. Aubyn* (*Sir John Molesworth*), [1950] 1 All E. R. 79, and secondly, to introduce and apply a statutory definition to determine whether any benefit acquired or reserved was to be treated as referable to the disposition of the life interest.

The section is certainly remarkable for the complexity of its terms and in order fully to appreciate the intendment it is necessary to refer to the historical background of this and analogous provisions of the Acts imposing a duty on death. This aspect is succinctly summarised by the judgment of Jenkins, L.J., in *Att.-Gen.* v. *St. Aubyn* (*Sir John Molesworth*), *supra*, at p. 82, *viz.* :—

> "The decisions in *Att.-Gen.* v. *Beech* and *Att.-Gen.* v. *De Preville* having shown that the Finance Act, 1894, s. 2 (1), did not suffice to bring into charge property in which the deceased had a life interest which had been surrendered and extinguished by a disposition, *inter vivos*, this omission was made good by the Finance Act, 1900, s. 11, which, to put it shortly, provided, in effect, that property in which the deceased or any other person had an interest limited to cease on the death of the deceased should be deemed to pass on

the death of the deceased, notwithstanding that it had been surrendered or otherwise disposed of whether for value or not to or for the benefit of the remainderman or reversioner, unless the same conditions were fulfilled as were required to exempt property comprised in a gift, *inter vivos*, from liability to duty under section 2 (1) (*c*) of the Act of 1894. By the Finance (1909–10) Act, 1910, s. 59 (1), the period of three years was substituted for twelve months as the period preceding the death of the deceased before which a gift, *inter vivos*, under section 2 (1) (*c*) of the Act of 1894, or a surrender of an interest limited to cease on the death of the deceased under section 11 of the Act of 1900, must have been made or effected in order to escape liability to duty.

The Finance Act, 1940, s. 43, replaced, and substantially extended the scope of, the Finance Act, 1900, s. 11, with a view, no doubt, to defeating the various methods which had been evolved of evading the operation of the old section, *e.g.*, by means of assignments by tenant for life and remainderman of their respective interests to a third party, or other indirect methods of effecting a merger of the life interest. The common expedient of making such assignments to a company formed for the purpose had already been specifically dealt with by the Finance Act, 1930, s. 35."

There the matter rested until the decision in *Att.-Gen.* v. *St. Aubyn*, *supra*. It is true that the Crown secured duty in that case but only by reliance upon the conjoint operation of sections 43 and 56 (2) of the Finance Act, 1940; the observations of the Court of Appeal (*vide*, pp. 87–88 of the above report) showed what have been somewhat inelegantly referred to as "loopholes" in section 43, *supra*.

The facts in that case were complex and do not easily lend themselves to summary but, for this purpose, assume the following,

(a) "A", tenant for life, sells his interest to "B", in consideration of an annuity for life.

(b) "B" now assignee of the life interest, surrenders the interest to "C" (the remainderman) in consideration of a lump-sum payment.

Now section 43, *supra*, before amendment, applied "if apart from the disposition the property would have passed on the death under section 1 of the Finance Act, 1894", *vide*, sub-section (1) (*a*), *ibid.* It is clear that apart from the disposition made by "A" the property would undoubtedly at his death have passed to the remainderman "C", it is equally clear that

notwithstanding the disposition made by " A ", the property would still pass at his death (to the remainderman).

In consequence one must look, if section 43 is to operate, for a disposition which had the effect of preventing the property from passing under section 1 of the Finance Act, 1894. On the facts hypothecated such a disposition is to be found in the surrender made by " B " to the remainderman " C ", but if this surrender took place more than five years before the relevant death, sub-section (2) of section 43 would obviate the charge of duty if the conditions therein specified had been satisfied and, in particular, if the property disposed of had been enjoyed to " the entire exclusion of the person who had the interest and of any benefit to him by contract or otherwise ".

The Court of Appeal, in the *St. Aubyn Case*, *supra*, took the view that the person who had the interest, in this context, was, to refer to our example, " B ", and as there was no benefit reserved to " B " there would be no charge under section 43.

Thus the so-called " loophole ".

Section 43 of the Finance Act, 1940, as amended, is therefore now to apply :—

by sub-section (1) to a disposition or determination " or any of them if there are more than one ";

by sub-section (1) (*a*) if the property would have passed under section 1 of the Finance Act, 1894, " had there been no disposition or determination as aforesaid ";

and by sub-section 2 (*a*) the surrender will only be effective where possession is enjoyed to the entire exclusion of the person who :—

" immediately before the disposition or determination " had the interest.

It will, therefore, be noted that on the face of it the amendments do no more than cover specifically the " loopholes " above referred to, as exemplified by the example. The secondary object of the amending legislation is covered by sub-sections (2) and (3) of section 43 (of the Finance Act, 1950).

The statutory definition of associated operations contained in section 59 of the Finance Act, 1940, is imported and the effect can be summarised in the words of the Solicitor-General in Committee (*Hansard*, Vol. 476, No. 61, col. 966) :—

" We say that when the reservation of the gift is effected by a transaction which is associated in terms of the statutory definition with the parting with the life interest, then the

property in which the life interest consists passes on the death and Death Duty is payable."

The section is in effect retrospective in operation in that it applies in the case of deaths occurring after April 18, 1950.

Section 44.—Collection of Duty from Trustees After Disposition or Determination of Life Interest

The liability of trustees to the claim for duty which may arise on the contingency of a life tenant's death within five years (or outside that period if a benefit were acquired or reserved) of the determination or partial determination of his interest, under section 43 of the Finance Act, 1940, has been a matter of doubt.

The Revenue's view has been that such a liability existed, under section 8 (4) of the Finance Act, 1894, and it has further been the procedure to agree with the trustees the sum which must be set aside from the settled funds to meet this prospective contingency.

The intention of the present section (*vide*, *Hansard*, Vol. 476, No. 61, col. 970. The Solicitor-General) is " simply and solely to put an end to a state of uncertainty in which trustees find themselves today. It is not to put a fresh and unjustifiable burden on them ".

The new section applies only to the determination or disposal (whether in whole or part) of a life interest chargeable under the provisions of section 43 of the Finance Act, 1940, and proceeds to enact that where by virtue of those provisions a claim to estate duty arises on the death (of the tenant for life)—

> " the following persons shall be accountable for any estate duty payable on the death by virtue of that section (in addition to any persons accountable therefor apart from this section), that is to say—
>
> (a) if the settlement under which the interest subsisted is in existence at the death, the trustees for the time being of that settlement; and
>
> (b) if it is not, the persons who were the last trustees of that settlement ".

It will be noted therefore that whoever may previously have been liable to account for the duty under section 8 (4) of the Finance Act, 1894, remains so liable but *in addition* to that liability the trustees are now liable; if, however, the settlement was determined prior to the date of the relevant death, the last trustees are the persons liable.

In the Bill as originally drawn the liability was extended to

the Personal Representatives of the last trustees, but as appears, the provision was deleted on report.

Statutory effect is given to the method whereby trustees may ascertain the extent of a prospective claim against them under this section (*vide*, sub-section (3), *ibid.*), by obtaining from the Commissioners a certificate of the amount which may, in the Commissioners' opinion, become payable—note that the sub-section applies :

(a) where the trustees may become accountable, and

(b) it is intended that the property or part thereof shall cease to be comprised in the Settlement,

the trustees must further give the Commissioners all the information and evidence required by them in connection with the application, but once obtained

> " no person shall be accountable as trustee of the Settlement for the duty to which the certificate relates to an amount in excess of the amount certified ".

The point was made strongly in the Report stages of the Bill that investment or other property ample to cover the certified amount, at the time given, might through no fault of the trustees depreciate with the result that the trustees might be left to make good the deficiency out of their own pockets.

As the matter is of such general concern it will be of interest to note the precise terms of the Solicitor-General's reply to this argument, *Hansard*, Vol. 477, No. 73, col. 411, *viz.* :

> " It has always been the practice of the Estate Duty Office not to expect the trustees in cases like this to pay out of their own pockets when it was found that the securities turned out to be inadequate for the purpose. In these circumstances they look to the beneficiaries to pay the excess, and I am able to say that the practice which has hitherto prevailed in that respect will be most certainly continued. If trustees in spite of that still feel nervous about the position, it has, after all, always been open to them to ask the beneficiaries to give them the requisite indemnity which will amply cover them, in the event of the securities they have set aside diminishing in value or being inadequate to meet any liability which may arise."

Where the trustees " may " be accountable, they are given a lien over the settled property for the prospective amount of the duty—on the assumption that it will become chargeable—and the costs in respect thereof (sub-sections (4) and (7)).

In the case of settled land, the trustees must necessarily be given protection against the possibilities of a claim under the

present section; this is done by sub-sections (5) and (6) which authorise the trustees

(a) to refuse to execute a deed of discharge under section 17 of the Settled Land Act, 1925, or

(b) to refuse to make or concur in a conveyance to a person entitled under section 7 (5) of the Settled Land Act, 1925,

in addition, where they refuse the conveyance under section 7 (5), *supra*, the trustees may require the holder of the last vesting deed to endorse a memorandum to the effect that the concurrence of the trustees to such conveyance is required; in the case of registered land the entry will be made on the register.

The trustees are entitled to take the foregoing steps when they "may" become accountable for the duty:

> "unless they are satisfied that they are effectively indemnified against their liability by virtue of this section up to the prospective amount of the duty and the costs in respect thereof".

There is an exemption to the liability imposed on trustees by the present section, or by section 8 of the Finance Act, 1894, in the case of advances to minors, provided first that the infant has not and does not attain a vested interest under the terms of settlement, and secondly, that the advance does not exceed one-half of the infant's presumptive share or interest in the settled property. If the advance is made under an express power, conferred by settlement or an implied power, *vide* section 32 of the Trustee Act, 1925, and the above conditions are satisfied, there will be no liability upon the trustees to account for duty, which under section 43, *supra*, and in the events, may become payable (sub-section (2)).

The liability imposed by the present section attaches in the case of deaths occurring after April 18, 1950, but the trustees' liability thereunder is not to exceed the property they hold, as such trustees, after that date.

Section 45.—Parliamentary Settled Estates

The section applies to a comparatively limited class of property, *i.e.*, to lands or chattels settled by Act of Parliament or Royal Grant. Prior to the passing into law of section 28 (3) of the Finance Act, 1949, such property fell within the scope of section 5 (5) of the Finance Act, 1894, with the result that the interest which fell to be valued for estate duty purposes at the tenant for life or tenant in tail in possession's death, was exempt from aggregation with other property then passing.

This exemption was abolished by sub-section (3) of section 28, *supra*, and in consequence although the tenant in possession

might have *de facto* disposed of his interest to the remainderman, more than five years prior to his death, reserving no benefit to himself, estate duty at his death would nonetheless be payable.

The section seeks to remedy that position by putting such a tenant on a par, vis-à-vis the release of his interest in possession to the remainderman, with the ordinary case of a tenant for life of settled land.

The detailed provisions appear to accomplish this purpose and to require no comment.

Section 46.—Dispositions in Favour of Relatives

The section and the principal section which it amends, *viz.*, section 44 of the Finance Act, 1940, are concerned with dispositions of property in favour of relatives, which latter term is defined by sub-section (2), *ibid.*

In order to appreciate the amendments it is necessary to refer to the background to this legislation. First, it is common ground that section 2 (1) (*c*) of the Finance Act, 1894, charges to tax certain gifts, *inter vivos*; the construction placed upon this section by the Irish Courts in *Att.-Gen.* v. *Smyth*, [1905] 2 Ir. R. 553, was to the effect that there was imposed by that section, a *prima facie* charge of duty on all transfers *inter vivos* within (what is now) five years of the transferor's death, and that the onus lay on the taxpayer to obtain an exemption by establishing such facts as would bring the case within the ambit of section 3 of the Finance Act, 1894 (exemption by purchase), or other statutory ground of exemption.

It is true to say that these views have, in general, been approved and accepted.

Section 44, *supra*, is drafted upon this view of the law. As Hanson in his 9th edition, at p. 393 states :—

> " as regards transfers of property this section depends for its efficacy on the proposition that under section 2 (1) (*c*) of the Finance Act, 1894, and incorporated statutory provisions duty attaches, subject to any specific exemption, to all property transferred within (now five) years of the transferor's death ".

The proposition was tested in *Re Earl FitzWilliam's Agreement*, [1950] 1 All E. R. 191; in that case F. in 1934 purchased an annuity from the trustees of a settlement under which M. (his son) was a beneficiary, for full consideration in money or money's worth. On F.'s death in 1943 the Crown claimed duty on the property transferred by F. to the trustees, under the provisions of section 44 of the Finance Act, 1940, that is to say in the view that

section 44, being applicable, necessarily excluded reliance by the taxpayer upon the exemptive conditions of section 3 of the Finance Act, 1894.

Danckwerts, J., rejected the claim concluding that section 2 (1) (*c*), *supra*, did not charge to duty a transfer for full consideration in money or money's worth, from which it necessarily followed that section 3 of the Finance Act, 1894, and, *ex hypothesi*, section 44, *supra*, were inapplicable.

The amendments to section 44 are ostensibly directed to re-establishing the position thought to subsist previous to the decision in *Re Earl FitzWilliam's Agreement*, *supra*. Thus by sub-section (1) (of section 46 of the Finance Act, 1950), any disposition made by the deceased in favour of a relative is to be treated as a gift unless certain conditions are satisfied, that is to say the onus is once again thrown back on the taxpayer, in the case of transactions with relatives, to establish that either :

" (a) the disposition was made on the part of the deceased for full consideration in money or money's worth paid to him for his own use or benefit; or

(b) the deceased was concerned in a fiduciary capacity imposed on him otherwise than by a disposition made by him and in such a capacity only ";

as to the latter criterion the words are taken from section 58 (5) of the Finance Act, 1940, and appear to need no comment (cp. the notes to that section : *Hanson*, 9th ed., pp. 443–4). The proviso to sub-section (1) is applicable where partial consideration is given and *pro tanto* exempts from the charge of duty : the wording follows section 3 (2) of the Finance Act, 1894.

The *status quo ante* having been restored, sub-section (1A) proceeds to repeat the old sub-section (1) of section 44, with consequential amendment; by its terms the creation of an annuity in favour *of the deceased* is not to be treated as consideration for a disposition, exempted from the charge of duty under the terms of sub-section (1) of section 46 of the Finance Act, 1950.

As always, the case of *ad hoc* amendment poses the question whether such amendment goes further than the mischief sought to be remedied; so far—although inevitably one advances the conclusion with hesitancy—it does not appear that section 46 has done more than effectively nullify the decision in *Re Earl Fitz-William's Agreement*, *supra*.

Sub-section (1B) is new to this context and will be applicable where a company within the scope of Part IV of the Finance Act, 1940—as defined by section 58 (1), *ibid.*—" is concerned " in transactions for which it is sought to claim exemption from duty

on the grounds that full or partial consideration passed; the exemption can only be secured to the extent that the Commissioners are satisfied that this position could be established, substantially if the company as a separate legal entity had no existence and at the material time had held its assets as trustee for the members. The provisions are taken, virtually in their entirety, from section 56 (1) of the Finance Act, 1940, and it may be of assistance in the construction to refer to the judgments in *Att.-Gen.* v. *St. Aubyn* (*Sir John Molesworth*), [1950] 1 All E. R. 79, at p. 88.

Sub-section (1C) is also new and provides that a gift made by a company over which the deceased possessed such degree of control as is specified by section 55 (3) of the Finance Act, 1940, is to be treated as a gift by the deceased, and the property so taken is to pass at his death :

> " if and to the extent to which the Commissioners are satisfied that they would fall to be so treated in the circumstances mentioned in the last foregoing sub-section "

that is to say the statutory hypothesis (*vide* sub-section (1B), *supra*) has again to be applied.

Amendments consequential on the foregoing are to be made to the following :

> Section 44 (5) of the Finance Act, 1940
>
> Section 40 (1) of the Finance Act, 1944
>
> Section 40 of the Finance Act, 1944, and paragraph 2 of the Third Schedule thereto.

Section 47.—Amendment of Section 51 of the Finance Act, 1940

The section must be read in the proper context, that is to say as part of and against the background of sections 46 to 59 of the Finance Act, 1940.

As is well known these sections deal with a situation where property is transferred to a " controlled company ", and provide a method of valuation by reference to the company's assets regulated by the quantum of " benefits " which the deceased had (or could have had) from such a company : in addition there is a similar method of valuation—in the case irrespective of the transfer of any property to the company—when there pass at the deceased's death shares in or debentures of such a company, provided that the deceased had certain prescribed degrees of control over, or financial interests in, that company.

Section 51 of the Finance Act, 1940, as amended by section 38 of the Finance Act, 1944, was directed to limiting and preventing a duplication of charge by reference to the same assets, *i.e.*, the assets of the company, where what one may term the " benefits " position and the " shares " position both subsisted.

Thus by sub-section (2) relief was given broadly where the same holding of shares or debentures of a company (1) gave rise to a charge under section 46 (benefits); and (2) the shares/debentures themselves were charged to duty on the death. This was then the condition of relief, that duty should be exigible both under the estate duty provisions, other than section 46 of the Finance Act, 1940, and under that section itself. Sub-section (2A) of section 51, *supra*, as so amended, extended the relieving provisions of sub-section (2) to a case where that sub-section would have applied but for the fact that the shares or debentures were exempted from estate duty, *e.g.*, by purchase under section 3 of the Finance Act, 1894.

Presumably, therefore, amendment became necessary by reason of the decision in *Re Earl FitzWilliam's Agreement*, [1950] 1 All E. R. 191 (see notes on section 46, *supra*), that is to say if a sale for consideration in money's worth were not within the scope of section 2 (1) (*c*) of the Finance Act, 1894, and not, *ex hypothesi*, within the provisions of section 3, *ibid.*, there would be no exemption, and it follows, no claim for relief available under sub-section (2A) of section 51 of the Finance Act, 1940, as it then stood.

Whether or not this be the correct conclusion as to the object of the amending legislation, the effect of the amendment, as stated, does not give rise to any particular difficulty in interpretation.

The new sub-section (1A) is to be added to section 51 of the Finance Act, 1940 (as amended), and briefly is to the effect that where the deceased has disposed of shares or debentures in money or money's worth therefor, he or his estate will not be chargeable for duty both on the section 46 proportion and also on the consideration passing.

Substantially therefore the position subsisting prior to the decision in *Re Earl FitzWilliam's Agreement*, *supra*, is restored and the amending provision does no more in effect than apply the relieving provisions of sub-section (2A), as previously existing, to a disposition within the statutory period, substituting the consideration (*i.e.*, the sale price) for the value of the shares/debentures in the latter sub-section.

In effect, therefore, duty is payable on the consideration or on the section 46 slice, but not on both.

Section 48.—Objects of National, Scientific, Historic or Artistic Interest

The Treasury in their discretion may grant exemption from all death duties in the case of such objects, specified by sub-section (3) of section 40 of the Finance Act, 1930, as appear to them to be of national, scientific, historic, or artistic interest.

Further conditions are now to be attached to the grant of such exemption, namely, that an undertaking must be given :

(a) to retain the objects in the United Kingdom;

(b) to take reasonable steps to preserve the objects;

(c) to afford reasonable facilities for examination to persons authorised by the Treasury, for research, or to check the state of preservation.

The foregoing briefly summarises the section, which presents no difficulty in construction. It should perhaps be added that sub-section (3), *ibid.*, makes provision for payment of duty on breach of the undertaking " in a material respect ".

THE DOMINANT ESTATE

By Peter Brett, LL.B., Solicitor

An easement properly so-called cannot exist in gross; it must be claimed or granted as appurtenant to an estate in land.

This statement has been made in so many cases that it might well be thought to be one of the oldest principles of real property law. But it is far from being so; it is a rule which, as Holdsworth has shown in his *History of English Law* (3rd ed.), Vol. III at pp. 153–157, probably originated as a rule of procedure, not of substantive law, and no reference to it is to be found in what is apparently the earliest known definition of "easement", in *Termes de la Ley*. In a later volume of the same work (Vol. VII, p. 324 *et seq.*), Holdsworth shows how the rule gradually became one of substantive law, during the course of centuries; but the transformation did not take place unchallenged. As late as 1862, Mr. Willes, editing the third edition of *Gale on Easements*, maintained strongly that easements could exist in gross, and based his view on a passage from the speech of Lord St. Leonards in *Dyce* v. *Hay*, 1 Macq. 305, 312. He referred to the learned Lord as having laid it down that a dominant tenement is unnecessary, but as the present editor of *Gale* points out, the passage cited does not warrant the claim; indeed, it appears to be no more than a passing reference to English law in an *obiter* passage in a Scots case. Mr. Willes' view was cited by the Court without disapproval in *Mounsey* v. *Ismay* (1863), 3 H. & C. 486, at p. 498, but in an earlier part of the same judgment (p. 497) the Court had referred to Mr. Gale's own view, that easements must be appurtenant, with apparent approval.

The matter was finally resolved in *Rangeley* v. *Midland Ry.* (1868), 3 Ch. App. 306, 310, 311, where Lord Cairns, L.J., said: "There can be no easement properly so called unless there be both a servient and a dominant tenement . . . There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement".

This statement has since been repeated in case after case, and the point may now be taken as settled. The one apparent exception to it (*Senhouse* v. *Christian* (1787), 1 T. R. 560) is very old, and although it has subsequently been cited with approval, the citation

has been on a different point; in the case itself the possibility that easements can exist in gross was apparently accepted by both parties and the Court without argument, but it is submitted that the case can no longer be accepted as an authority for such a doctrine. It may also be noted that section 187 (1) of the Law of Property Act, 1925, seems to confirm this view.

It may here be pointed out that, although we habitually speak of easements as appurtenant to *land*, the mode of expression is inaccurate. An easement is a right exercised by a person who is the owner of an *estate* in land and because he is owner of that estate; the easement is therefore appurtenant, not to the land, but to the estate. There are thus three factors involved—the estate, the estate owner, and the right or easement itself. It is with this triple relationship that the present article is concerned.

It is clear that not every right over another's land, which is a privilege without a profit and is exercised by another in his capacity as owner of another estate, is necessarily an easement appurtenant to that other estate. In order to be such, there must be a connection between the estate and the right claimed as an easement. The nature of that connection has been discussed in a number of leading cases, and perhaps the best summary of them is the following passage from the judgment of Lord Hanworth, M.R., in *Todrick* v. *Western National Omnibus Co., Ltd.*, [1934] Ch. 561, at pp. 573–574:—

"I think the true test which we have to apply is that which is broadly stated in *Gale on Easements*, 11th ed., p. 19: 'So in English law an easement must be connected with the enjoyment of the dominant tenement and must be for its benefit'.

That proposition is established by an examination of three cases. The first is the case of *Bailey* v. *Stephens*, 12 C. B. (N.S.) 91, in which Willes, J., says at p. 112: 'I mean the case of a conveyance by which a certain incident is granted which, though beneficial to the grantee of the land so long as he remains the owner of it, and beneficial in respect of his ownership of the land, can be of no benefit to any other person. And the authorities are to this effect, that, at common law, a benefit of that description went into whosesoever hands the land might pass'. Equally, Byles, J., says at p. 115, after referring to *Ackroyd* v. *Smith*, 10 C. B. 164, and after referring to a right of way: 'It must, in addition to that, have some natural connection with the estate, as being for its benefit, or, as has been expressed, it must inhere in the estate'. Those passages that I have just quoted were referred to with approval by Hamilton, L.J., as he then was, in the case of *Att.-Gen.* v. *Horner* (*No. 2*), [1913] 2 Ch. 140, where he said at p. 196: 'Now it is well

settled that an easement appurtenant must be for the benefit of the inheritance to which it is appurtenant. "It must be beneficial to the land and beneficial in respect of the ownership of the land, and not beneficial to any other person": *per* Willes, J., *Bailey* v. *Stephens*: "It must have some natural connection with the estate as being for its benefit": *per* Byles, J.' That seems to give the real test, which does not require physical contiguity. Applying that test to the present case the only consideration is whether or not there can be a better enjoyment of the blue land by this right of way, whether the right of way is beneficial in respect of the ownership of the land".

It will be observed that in the above extract, and those cited in it, the references to the dominant estate are such as to imply that an easement must be appurtenant to a corporeal hereditament. It is possible, however, that an easement may be appurtenant to an incorporeal hereditament; such was the opinion (*obiter*) of Buckley, J., in *Hanbury* v. *Jenkins*, [1901] 2 Ch. 422, where he held that a right of way might be appurtenant to a several fishery. The opinion of Lord Alverstone, L.C.J., in *Att.-Gen.* v. *Copeland*, [1901] 2 K. B. 101, that an easement cannot be made appurtenant to a public right of way does not contradict this, for a public right of way can hardly be regarded as an incorporeal hereditament. It should also be noted that, if the test proposed by Lord Hanworth, M.R., is fulfilled, the easement is not invalid merely because the exercise of the right by the dominant owner confers some benefit upon other tenements; this was decided in *Simpson* v. *Mayor of Godmanchester*, [1897] A. C. 696.

The principles which have already been noticed are of great practical importance to the owners of statutory undertakings for the supply of gas, water, etc. These undertakers have to lay pipes or cables across land for the purpose of supplying the commodities which they produce; normally they do so in pursuance of powers granted by Act of Parliament, and then no question arises. But suppose they obtain their rights by an act *inter partes*, it at once becomes necessary to decide what is the nature of the right acquired; for if it is not an easement, but a mere licence, a subsequent owner of the land affected can require them either to remove the pipe or to pay anew for the right to retain it where it is. The point was noticed, but left unresolved, in *West Midland Joint Electricity Authority* v. *Pitt*, [1932] 2 K. B. 1, 30. It arose again in *Re Salvin's Indenture*, [1938] 2 All E. R. 498. In that case, a water company was empowered by its special Act to lay pipes within certain permitted limits of deviation; however, it wished to go outside those limits, and accordingly entered into a deed with

a Mr. Salvin whereby, in consideration of a certain sum, he granted to the company the right to lay certain pipes across his land and maintain them there in perpetuity. Later, the then owners of the land affected desired to develop it by building over the line of the pipe, and brought a friendly action against the then owners of the water company's undertaking to determine their respective rights. Farwell, J., held that the water company had not acted *ultra vires* in taking the grant, and continued (at pp. 506, 507) :—

"It is said that here there is no dominant tenement. In my judgment, that is not sound. The undertaking in this case, which is now vested in the defendants, consists of corporeal hereditaments and incorporeal hereditaments, the corporeal hereditaments being the lands which the company acquired for the purpose of its object—that is to say, lands for the erection of reservoirs and other similar purposes—and the incorporeal hereditaments being the rights which it acquired in land of others, to lay pipes and for other purposes. The undertaking, in my judgment, being composed of corporeal and incorporeal hereditaments, is capable of being the dominant tenement in respect of such a grant as this. It is plain that the dominant tenement need not be contiguous to the servient tenement. . . ." He referred to *Todrick's Case* (*supra*), in which his judgment had been reversed by the Court of Appeal, and continued " . . . The limit is, therefore, that it [the subject-matter of the alleged easement] must be a right which is capable of being, and intended to be, used in connection with the dominant tenement.

In the present case, in my judgment, it is plain that this easement was one which was intended to be, and was capable of being, used and exercised in connection with the undertaking of the Weardale Company, and if that be so, it must follow, in my judgment, that this was an easement which is capable of being created, not an easement in gross."

It cannot be pretended that this judgment is at all satisfactory. To begin with, there is nothing in the wording of the indenture itself to indicate that the rights thereby granted were intended to be granted as easements appurtenant to the company's undertaking. It is of course true that no particular words are necessary to the grant of an easement; see the speech of Lord Wensleydale in *Rowbotham* v. *Wilson* (1860), 8 H. L. C. 348, 362. But it would seem that Farwell, J., placed a strained construction on the deed before him. Then again, it was surely a novel conception to say that an easement can be granted as appurtenant to a company's undertaking. We have already seen that there is some doubt

whether an easement can be made appurtenant to an incorporeal hereditament; while there is no doubt that it could be made appurtenant to certain defined estates which were at the time of the grant owned by the company, there is surely equally no doubt that such appurtenancy cannot be transferred if the company sells those lands and buys others which it devotes to the same purpose. Yet that is presumably what is involved in the conception of appurtenancy to the undertaking.

Even if it is assumed that the " easement " in the *Salvin Case* was intended to be appurtenant to the company's estates used for reservoirs, as Farwell, J., suggested, it is submitted that the rights granted would not come within the scope of the rule enunciated in *Todrick's Case* (*supra*). No doubt they were intended to be " used and exercised in connection with " the dominant lands, as Farwell, J., says; but he paraphrased the words used by Lord Hanworth, M.R., in the earlier case. There was surely no " better enjoyment " of the reservoir lands by reason of the laying of the new mains; there was merely an increase in the business carried on by the owners of those lands. So far as " benefit " and " enjoyment " are concerned, these accrued, not to the lands which supplied the water passing through the mains, but to the lands supplied with that water. This is not to say that an easement cannot be validly granted if it is required solely for business, as opposed to domestic, purposes; that suggestion was rightly rejected by Goddard, L.J., as he then was, in *Paine* v. *St. Neots Gas and Coke Co.*, [1938] 4 All E. R. 592, 597. In *Paine's Case*, as the learned Lord Justice pointed out, the water supplied was to be used (for business purposes) *at the plaintiffs' hereditament*. This was not so in the *Salvin Case*.

Finally, it may be pointed out that, if Farwell, J.'s judgment is correct, it leads to a thoroughly illogical result. It can no longer be disputed that if a statutory undertaking lays its pipes or cables in pursuance of its statutory rights, it does not obtain easements; this was laid down by Evershed, J., as he then was, in *Newcastle-under-Lyme Corporation* v. *Wolstanton, Ltd.*, [1947] Ch. 92, 103, on the ground that the incidents ordinarily appropriate to the existence of an easement are absent, and his view on this point received the approval of the Court of Appeal ([1947] Ch. 427). There is surely no reason why these ordinarily appropriate incidents should be present because the rights are obtained by an act *inter partes* instead of by statute.

It is accordingly submitted that *Re Salvin's Indenture* was decided contrary to the well-established principles of the law relating to easements, and it is to be hoped that the Court of Appeal will

take the earliest opportunity to overrule it. It is no doubt desirable, as Dr. Potter has pointed out in a note on the case (54 L. Q. R. 487–9), that the law should keep pace with the complexities of modern life, but it seems undesirable to achieve this end by overthrowing well-known principles under colour of following them.

The triple relationship to which reference has already been made involves some consideration of the capacity of the grantee to take the grant. The easement is granted (normally) to a named grantee, to be appurtenant to his estate in certain land. Need he own that estate at the time the grant is made? *Gale* (*op. cit.*) deals with this point in two passages, on pages 18 and 40 of the 11th edition. With some hesitation, he suggests that the grant will be good, if the grantee subsequently acquires the dominant estate, and if (a) the dominant estate was supposed at the time of the grant to belong to the grantee or (b) the grantee had at the time of the grant some interest in the dominant *land*. He also mentions certain possible cases which are founded on the doctrine that a grantor will not be allowed to derogate from his grant; the limits of that doctrine, which does not concern the present discussion, are fully explained in the well-known case of *Browne* v. *Flower*, [1911] 1 Ch. 219.

For the first of the alternative conditions mentioned above, reliance is placed upon the law of estoppel, and certain remarks of Lord Wensleydale in *Rowbotham* v. *Wilson* (*supra*) are referred to. As to this, it may be said that Lord Wensleydale's remarks were entirely *obiter*; and in any event, they deal with the position of a grantor who subsequently attempts to deny his own capacity to make the grant. No doubt he would be estopped from so doing; but there seems to be no reason why a grantor should be estopped (at any rate in the absence of fraud on his part) from denying his grantee's title to take the grant. The principles on which the law of estoppel is based are fully explained by Lord Maugham in *Greer* v. *Kettle*, [1938] A. C. 156, 168, and they do not seem to go as far as that.

For the second alternative, two authorities are cited : *Rymer* v. *McIlroy*, [1897] 1 Ch. 528, and *North British Ry.* v. *Park Yard Co.*, [1898] A. C. 643. The first of these cases undoubtedly supports the proposition made, and the facts and the decision upon them are sufficiently set out in the following extract from Byrne, J.'s judgment (pp. 534–5) :

" The short point is this. John Drummond was the tenant from year to year of the plot marked C, and in 1870 he acquired the fee simple in the plot. The defendant claims as lessee of that plot from persons who purchased from owners of the fee claiming under John

Drummond. The other plot was held under a lease which has expired, and no question arises as to the right of way to that piece. The plaintiffs say that, as John Drummond was only tenant from year to year when the grant and covenant was entered into, the grant was only intended to give him a right of way while that tenancy continued, and not to give him a right of way in respect of any interest which he might acquire. But in my judgment that is not the true construction, having regard to the words 'heirs and assigns', and looking at the whole tone and tenour of the deed, and the fact that John Drummond shortly afterwards acquired the fee. The true construction is that, so long as the Drummonds, or either of them, or the heirs or assigns of either of them were interested, this right of way was to subsist. The probability is, and it is not an unnatural inference to draw, that it was within the contemplation of the parties that the Drummonds might obtain the fee simple in one or more of the plots in which they had then only a limited interest, and that in that case the right of way should continue. I can see nothing illegal in such an agreement, and if that is the contract no such doctrine as that the covenant was with the reversioner, who has destroyed the reversion, arises. The case cited from the Year Books is admittedly no authority in the present case, for there the grantee of the right of way had no interest in the mill at the time when the right of way was granted".

The *ratio decidendi* of this case is, it will at once be seen, not very easy to grasp. If the learned Judge meant that the original grant was of an easement in perpetuity determinable if the Drummond's leasehold interest expired, it is difficult to follow how it could be valid, for an easement in perpetuity can surely not be appurtenant to a lesser estate than a fee simple. On the other hand, if the grant is to be construed as one of an easement from year to year, which is to terminate and *eo instanti* be replaced by an easement in perpetuity when the fee simple is acquired, it is surely invalidated by the rule against perpetuities. That rule (save in the cases enumerated in section 162 (1) of the Law of Property Act, 1925) seems clearly to apply to the creation of easements *in futuro*; see Gray, *The Rule Against Perpetuities*, 3rd ed., paras. 314–316, and the cases there cited.

The final sentence of the extract cited above is interesting. The case referred to is *Smeteborn* v. *Holt*, 21 Edw. III, fo. 2, pl. 5, in which it was said that where a right of way over land to a mill was granted, and the grantee was not then seised of the mill, but afterwards purchased it, the purchase would not enable him to maintain an action against the grantor of the way for disturbing him in the way. The reason given by Byrne, J., for distinguishing

this case is not very convincing. Easements, as we have seen, are appurtenant to estates, not to land. In deciding whether a grantee can take an easement appurtenant to a fee simple estate, it is surely no more relevant to say that he has a leasehold estate in the same land than to say that he has a fee simple estate in other land.

Rymer v. *McIlroy* is thus an unsatisfactory decision in many respects. It must, however, be said that there was a covenant as well as a grant, and that the plaintiff owners of the servient land were the original covenantors. The decision may therefore perhaps be supported on the basis of the covenant, as is suggested in the note of it in *Halsbury's Laws of England* (2nd ed., Vol. XI, p. 278); the perpetuity point would then not arise (see *Hutton* v. *Watling*, [1948] Ch. 26, and the cases cited by Jenkins, J., as he then was).

The *North British Railway Case* undoubtedly suggests that the grant of an easement will be good if the grantee subsequently purchases the dominant land. But it is a Scots case, and it is clear from the speeches of Lords Watson and Morris that in Scots law servitudes do not necessarily require a grant; they may be created by a written agreement followed by possession and use. Furthermore, the rule against perpetuities is unknown to Scots law in anything approaching its English form. The principles regulating the creation of servitudes in Scots law are thus so different that the case cannot be regarded as of authority in English law.

It is accordingly submitted that the grant of an easement to a named grantee will only be valid if the grantee owns the dominant estate at the time the grant is made. That dominant estate must of course be sufficient to support the easement, *e.g.*, an easement in fee simple cannot be appurtenant solely to a term of years in the dominant land. It may be remarked that no assistance can be derived, in the cases which have been discussed, from section 56 (1) of the Law of Property Act, 1925, for reasons which are sufficiently set out in the judgment of Simonds, J., as he then was, in *White* v. *Bijou Mansions, Ltd.*, [1937] Ch. 610, 625.

The above submission is supported by the cases on prescription. Prescription at common law is based upon the presumption of a grant made before the time " whereof the memory of man runneth not to the contrary " : see *Holdsworth*, *op. cit.*, Vol. III, pp. 166–171, and *per* Lord Maugham in *Wolstanton, Ltd. and Att.-Gen. of the Duchy of Lancaster* v. *Newcastle-under-Lyme Corporation*, [1940] A. C. 860, 877. It was accordingly the practice, upon a claim by such prescription, to plead such a grant, as a grant by an owner in fee *to an owner in fee*; *per* Parke, B., in *Bright* v.

Walker (1834), 1 Cr. M. & R. 211, 221, and also Hullock, B., to the same effect in *Att.-Gen.* v. *Gauntlett* (1829), 3 Y. & J. 93, 98, 99. In claims under the Prescription Act, 1832, it is only necessary (owing to the wording of the Act) to plead the requisite user, and accordingly a lessee can prefer such a claim. But even here, it has been held that he acquires on behalf of his reversioner: *per* Collins, M.R., in *Kilgour* v. *Gaddes*, [1904] 1 K.B. 457, 462.

We have thus seen that a grant of an easement may be invalid either because it does not benefit the estate to which it is purported to be annexed, or because the grantee does not own that estate. What is the position where a grant is only partly invalid on either of those grounds? Such a case may arise in several ways. For instance, the grant may purport to annex the easement to two separate defined plots of land, one of which can be benefited, and the other of which cannot; or again, the grantee may own one of the plots but not the other. Is the whole grant thus invalidated?

It is submitted that it is. It will be remembered that in *Re Ballard's Conveyance*, [1937] Ch. 473, Clauson, J., as he then was, was unable to find any authority which would justify him in severing the restrictive covenant with which he was dealing and treating it as annexed solely to the land which it in fact touched and concerned. Dr. Cheshire, in his *Modern Law of Real Property* (6th ed., p. 290), takes the learned judge to task for so holding, but it is suggested that these strictures are unjust. At any rate, whatever may be the case as regards restrictive covenants, there certainly appears to be no authority under which the Court could sever, or rewrite, an ineffective *grant* so as to make it effective. The point appears to have arisen on the facts in *Rymer* v. *McIlroy* (*supra*), but it was not taken in argument, and in view of the judge's decision did not arise in the judgment.

If it is not permissible to sever the grant of an easement annexed to two or more plots of land, and valid as regards only some of those plots, still less could the Court rewrite a grant in which the easement is annexed to one entire plot, only part of which can possibly be benefited. Here there would be no question of severance, but only of substituting a new and different grant from that already made.

It should be noted that if a grant is invalidated for the reasons above mentioned, no user thereunder, however long, will ground a claim to the easement (for the lands actually benefited) by prescription. This is of course consistent with the theory that prescription rests upon an effective grant long since lost; for if it is shown that an ineffective grant was in fact made, how can the Court presume the existence of an earlier effective grant? That

this is the law is shown by the case of *Campbell* v. *Wilson* (1803), 3 East 301, which was followed, after the Prescription Act, 1832, in *Lord Rivers* v. *Adams* (1878), 3 Ex. D. 371, and again in *Att.-Gen.* v. *Horner* (*No. 2*), [1913] 2 Ch. 169, 179. In *De la Warr* v. *Miles* (1881), 17 Ch. D. 535, the same point arose in a case on *profits à prendre*, and the Court of Appeal held that the profit might be claimed under the Prescription Act despite the existence of an ineffective grant. *Gale*, *op. cit.*, suggests, at p. 245 of the eleventh edition, that *De la Warr* v. *Miles* establishes a different rule for *profits à prendre*, but it seems from the judgments that the Court founded their decision on the wording of the Act. The case was not referred to in *Att.-Gen.* v. *Horner* (*No. 2*)—also a decision of the Court of Appeal—so that the point must at present be regarded as uncertain, but the weight of authority is clearly against allowing a claim by prescription.

Where the difficulty arises because the easement is annexed partly to an estate which cannot be benefited thereby, it would seem that no assistance can be derived from section 187 (1) of the Law of Property Act, 1925. That subsection appears to be merely declaratory, and not to introduce any new principle: see Wolstenholme and Cherry, *Conveyancing Statutes* (12th ed.) Vol. I, p. 549.

The difficulties which we have thus noted may, however, to a large extent be overcome by making use of the " pointer " afforded by the case of *Marquess of Zetland* v. *Driver*, [1939] Ch. 1. If the easement is annexed to " each and every part " of the dominant estates, the Court will have no difficulty in regarding it as effective as regards those estates actually benefited. It is thus perhaps some consolation to know that the pitfalls we have noticed can be avoided by fully investigating the grantee's title and by careful drafting.

ESTATE AGENTS' COMMISSION

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The question as to when an estate agent is entitled to commission has been the subject of several recent cases in the Court of Appeal, and certain earlier cases, which had become generally accepted as good law, have been overruled. The object of this article is to try to analyse the present position.

The landmark in the history of commission cases is *Luxor (Eastbourne), Ltd., and Others* v. *Cooper*, [1941] A. C. 108, since it is the only decision of the House of Lords on this subject. It is convenient to consider first what the *Luxor Case* decided, and then to consider both the earlier cases and the later ones.

The facts in the *Luxor Case* were briefly as follows. The plaintiff estate agent (the respondent in the House of Lords) alleged that he had produced ready and willing purchasers who were prepared to buy the defendants' property on the terms on which they were prepared to sell it. The sale never took place, but the plaintiff claimed that he was entitled to damages equivalent in amount to the commission which he would have earned had not the defendants broken the implied term of the contract between them by which (as he alleged) they undertook to do nothing to prevent him from earning the commission due according to that contract.

The House of Lords rejected the idea that there could be any implied term in such a case. Viscount Simon, L.C., pointed out ([1941] A. C. 118) that if it really were the common intention of the owner of the property and the agent that the owner should be bound in the manner suggested, there would be no difficulty in so providing by the express terms of the contract; in the absence of such an express term, he was unable to regard the suggested implied term as "necessary". He said ([1941] A. C. 119): "There is, I think, considerable difficulty, and no little danger, in trying to formulate general propositions on such a subject, for contracts with commission agents do not follow a single pattern and the primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion, and then to consider whether these express terms necessitate the addition, by implication, of other terms".

Lord Simon proceeded to divide contracts with estate agents into three classes, as follows :—

1. The class in which the agent is promised a commission by his principal if he succeeds in introducing to him a person who makes an adequate offer, usually an offer of not less than the stipulated amount. In this case the agent is entitled to be paid when he has introduced a person making an adequate offer, whether or not his principal accepts the offer and carries through the bargain; no implied term is necessary to secure this result.

2. The class in which the property is put into the hands of the agent to dispose of it for the owner, and the agent accepts the employment, and possibly expends money and time in endeavouring to carry it out. Here there may well be an implied term that the principal will not withdraw his authority after the agent has incurred substantial outlay, or, at any rate, after he has succeeded in finding a possible purchaser. Each case, as Lord Simon pointed out, turns on its own facts, and the phrase " finding a purchaser " is itself not without ambiguity.

3. The class in which, by the express language of the contract, the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about between his principal and the offeror. The *Luxor Case* itself fell into this class. There is no room for implied terms such as the plaintiff there suggested must exist. The agent is promised a reward in return for an event, and he runs the risk of disappointment should the event not happen; but if he is not willing to take the risk, he should introduce into the express terms of the contract such a clause as will protect him.

When the other cases come to be considered, it will be seen that the majority of them fall into the third class, while a few fall into the second class. There is only one reported case—and it is an unsatisfactory one—which comes within the first class.

Lord Russell of Killowen suggested that the transaction is to be taken as completed when there is a binding contract between vendor and purchaser. In that case " The position will no doubt be different. . . . In that case it can be said with truth that a ' purchaser ' has been introduced by the agent; in other words the event has happened upon the occurrence of which a right to the proposed commission has become vested in the agent. From that moment no act or omission by the principal can deprive the agent of that vested right." ([1941] A. C. 126). Lord Wright expressed similar views. As Hilbery, J., concluded in *Jones* v. *Lowe*, [1945] K. B. 73, 76, the proposition set out by Lord Russell of Killowen's *dictum* is that, if an agent's commission is payable on his

introducing a purchaser, he does not earn that commission merely by introducing someone who is ready and willing to purchase, but only earns it if the person who is ready and willing to purchase goes so far as to sign a legal contract binding him to go through with the purchase. It is to be observed that Lord Russell of Killowen struck a cautious note when he said ([1941] A. C. 129) that "clear and unequivocal language" was necessary before a vendor could be said to have bound himself to pay commission on the mere introduction of a person who offered to purchase : that is to say, for the case to come within the first of Lord Simon's three classes.

The cases prior to the *Luxor Case* will now be considered. As a matter of convenience, they will be taken in chronological order.

Simpson and Another v. *Lamb* (1856), 17 C. B. 603, though not a case involving an estate agent, deserves mention because, as Jervis, C.J., said in his judgment (at p. 616), the case was "like the case of the house-agent". Moreover, it was referred to by Lord Wright in the *Luxor Case* ([1941] A. C. 142, 143), and although his Lordship did not expressly approve it, it is clear that it is still good law, and that it falls within the third of the classes of case enumerated by Lord Simon. The plaintiffs were clerical agents, who were employed by the defendant to offer for sale an advowson, upon an understanding that, in the event of the plaintiffs effecting a sale, they should receive commission on the purchase price. The defendant then sold the advowson himself, and the plaintiffs brought an action charging a wrongful revocation of their authority. Cresswell, J., nonsuited the plaintiff, holding that the defendant was justified in revoking his agents' authority and selling the living himself. He based his decision on the fact that it was fair to presume that the large amount of commission taken in cases of this kind when the agents successfully brought about a sale was to make up for the risk incurred by them of not receiving anything when, as happened in this case, they did not sell anything. A rule *nisi* for a new trial was discharged by the Court of Common Pleas.

The *Luxor Case* has shaken the authority of *Prickett* v. *Badger* (1856), 1 C. B. (N.S.) 296. The defendant in that case agreed with the plaintiff that the latter should, for commission, find a purchaser for a piece of land. It later appeared that the defendant had no interest in the land, and it was held that the plaintiff was entitled to sue for a reasonable remuneration for his work and labour. It came to be said that this case laid down a general principle that, where an agent is employed at an agreed commission to sell land, and finds a purchaser able and willing to purchase

at the price stipulated, but the landowner refuses to sell and rescinds the agent's authority, the agent is entitled to sue on a *quantum meruit* for his work and labour on the ground that the performance of the contract was prevented by the defendant's wrongful act. The House of Lords in the *Luxor Case* rejected this suggestion, and, while not overruling *Prickett* v. *Badger*, distinguished it, as turning on its own very special facts.

The original agreement between the principal and the agents in *Green and Another* v. *Mules* (1861), 30 L. J. C. P. 343, was that the agents should find either a purchaser or a mortgagee of the defendant's estate. It appears that later a new agreement was substituted, namely that the agents should write a letter to a certain person, N., and that, if their letter induced him to become a purchaser or mortgagee, the agents should be paid £100. N. ultimately became a mortgagee, but he denied that he had been influenced by the agents' letter. The agents claimed on a *quantum meruit*, but the Court held that they were not entitled to it. Erle, C.J., seems to take the view that a house agent is not entitled to recover for his services on a *quantum meruit* claim where the principal has had no value out of those services. Willes, J., who was a member of the Court in *Prickett* v. *Badger*, distinguished the present case from that one, because in *Prickett* v. *Badger* the plaintiff had done everything which he was required to do, but had had the matter taken out of his hands by his principal, whereas in the present case there was an agreement that the agency was to be at an end if N. did not advance the money, and that the agents were to have £100 if he did. In other words the agent was to have his commission only upon completion of the transaction : see Lord Simon's third class of case.

The next case to be considered, *Inchbald* v. *The Western Neilgherry Coffee, Tea, and Cinchona Plantation Co., Ltd.* (1864), 17 C. B. (N.S.) 733, relates not to an estate agent, but to a stockbroker : nevertheless, the case is relevant, because Lord Simon thought that it fell within the second class of case which he enumerated. The plaintiff in *Inchbald's Case* was appointed as broker to the defendant company to sell their shares on the terms that he was to receive £100 down and a further £400 on the allotment of the whole of the shares of the company, which had been formed to purchase a tea estate. The owner of the estate refused to sell, and the directors decided to wind up the company. No shares had been allotted, so that the plaintiff had not earned his commission in accordance with the terms of the agreement. It was held that the plaintiff was entitled to recover a proportion of the promised commission, the *ratio*

decidendi apparently being that there was a term necessarily implied in the contract that the company would do nothing to prevent their agent from doing the work which the contract between them bound him to do. It must be added that Lord Wright, in the *Luxor Case*, expressed himself ([1941] A. C. 147) unable to understand this decision except on the ground that the case was treated as analogous to a case of wrongful dismissal : but the other noble and learned Lords did not appear to have the same difficulty, and it is respectfully submitted that the *ratio decidendi* which is given above—and which was, indeed, presumed by Lord Russell of Killowen ([1941] A. C. 128)—is a perfectly reasonable one.

In *Roberts* v. *Barnard* (1884), Cab. & E. 336, the defendants employed the plaintiffs on a commission basis to sell certain ground rents. The plaintiffs found a purchaser, who was willing to complete, but his solicitor objected to a clause in the agreement of sale, which was in fact unreasonable, and the defendants refused to complete. The plaintiffs claimed their commission, or, alternatively, damages because the defendants had wrongfully prevented them from earning their commission. Mathew, J., held that the plaintiffs were entitled to damages, the measure of damages being the full amount of commission which they would have earned. It appears that this case falls within the second of Lord Simon's classes, on the ground that the defendants wrongfully withdrew their authority after the agents had found a possible purchaser.

The defendant in *Taplin* v. *Barrett* (1889), 6 T. L. R. 30, employed the plaintiffs to sell a house for him. Three months later, no sale having been effected, the defendant put the house up to auction, where it was bought by S., who had previously been introduced by the plaintiffs, but had then made various stipulations. The County Court Judge, applying *Prickett* v. *Badger*, awarded the plaintiffs damages, apparently on the basis of remuneration for their expenses and work in connection with the matter, and this decision was upheld by a Divisional Court of the Queen's Bench Division. The terms of the agreement between the parties appears to bring this case within Lord Simon's third class, and it is respectfully submitted that this means that it was wrongly decided.

The next two cases both fall within class three. The defendant in *Grogan* v. *Smith* (1890), 7 T. L. R. 132, put his house into the hands of the plaintiff to find a purchaser of the lease. The plaintiff found a possible purchaser, but no definite agreement was reached, and the sale went off. The Court of Appeal held that the plaintiff was not entitled to commission. In *Lott* v. *Outhwaite* (1893), 10 T. L. R. 76, the agreement was that the agent should receive

commission "on completion of the purchase". The purchase was never completed in its entirety, though part of the estate was sold. The agent's assignee brought an action for the commission, or, at any rate, a remuneration *quantum meruit*. The Court of Appeal held that, in order to be entitled to his commission, the agent must prove either that the purchase had been completed, or that, if it had not, the non-completion was due to the fault of the vendor, which, in the circumstances of the case, it was not.

The defendant in *Passingham* v. *King* (1898), 14 T. L. R. 392, instructed the plaintiff to find a purchaser of his public house. The plaintiff having found a potential purchaser wrote to the defendant saying that the commission would be £100; this the defendant accepted. Subsequently the defendant himself took up the negotiations with the potential purchaser, taking them out of the plaintiff's hands, and eventually the purchase went off. In view of the fact that the defendant had taken the matter out of the hands of the plaintiff, the Court of Appeal thought that the plaintiff was entitled to his commission. Vaughan Williams, L.J., did not think that the plaintiff had done everything necessary to entitle him to commission, but thought that the defendant by his subsequent conduct had waived the right which he would otherwise have had to call upon the plaintiff to do certain things as a condition precedent to commission becoming payable. It is difficult to reconcile this case with *Brinson* v. *Davies* (1911), 105 L. T. 134, and *Bentall, Horsley and Baldry* v. *Vicary*, [1931] 1 K. B. 253 (*infra*), but it is a decision of the Court of Appeal and it has never been overruled. If it can be upheld, it appears to be a class two case. So does *Nosotti* v. *Auerbach* (1899), 15 T. L. R. 140. There the defendant employed the plaintiff to sell the lease of his house. The plaintiff found a purchaser, but the defendant refused to give up possession at the date required by the purchaser, so that the purchase went off. The plaintiff brought an action for commission or damages for preventing him from earning his commission. The Court of Appeal held that where a person employs an agent to sell the lease of a house of which he is in occupation, and nothing is said about going out of possession, there is an implied promise to do so within a reasonable time, so that, in the circumstances, the plaintiff was entitled to judgment.

The remaining cases decided before the *Luxor Case* all fall into class three. The facts in *Beale* v. *Bond* (1901), 84 L. T. 313, were curious. The plaintiff employed the defendant to find a purchaser for his property, not on the usual commission terms, but on the terms that the plaintiff was to receive £1,150, and the defendant was to have anything over and above that amount which he might

obtain. The defendant found a purchaser, who paid a deposit, but the sale was not completed, owing to the purchaser's default, and the deposit was forfeited. The plaintiff sued for the deposit, and the defendant counterclaimed for commission. The Court of Appeal held that the plaintiff was entitled to succeed, and that the defendant was not entitled to his commission, but allowed him five guineas as fair remuneration for his services. It is respectfully submitted that the defendant was not entitled to this remuneration, and that to this extent this case was wrongly decided: the terms of the agreement clearly suggest that no commission was to be payable unless the agent found someone who actually bought the property.

The plaintiffs in *Millar, Son, and Company* v. *Radford* (1903), 19 T. L. R. 575, introduced a person C., who took a lease of the defendant's property. Later C. bought the freehold, and the plaintiffs claimed commission on the purchase price. The case is of particular value for the observations of Sir Richard Henn Collins, M.R., on the rights of estate agents. The right to commission did not arise out of the mere fact that agents had introduced a tenant or a purchaser. It was not sufficient to show that the introduction was a *causa sine qua non*. It was necessary to show that the introduction was an efficient cause in bringing about the letting or the sale.

The agreement in *Chapman* v. *Winson* (1904), 91 L. T. 17, was that commission should be payable if a person was introduced within one week and became the purchaser of the property. A formal contract was signed, but later the purchaser, being unable to find the balance of the purchase money and carry out the contract, was released by the defendant. The Court of Appeal held that there was a condition precedent that, before commission should become payable, the purchase should be completed, by payment of the purchase money, so that the agent was not entitled to commission.

The defendant in *Brinson* v. *Davies* (1911), 105 L. T. 134, put his property into the hands of an agent, but afterwards sold it himself. It was held by the Divisional Court of the King's Bench Division that where the owner of property puts it into the hands of an agent, there is, in default of any stipulation to the contrary in the contract, an implied term that the owner shall be at liberty to sell the house himself or to employ other agents, so that, if a sale takes place by this means, the original agent, even though he finds a person prepared to purchase, is not entitled to commission. Compare *Taplin* v. *Barrett* and *Passingham* v. *King* (*supra*).

The facts in *Nightingale and Others* v. *Parsons*, [1914] 2 K. B. 621, were almost identical with those in *Millar, Son, and Company*

v. *Radford* (*supra*), and the test stated by Sir Richard Henn Collins, M.R., in that case was applied by the Court of Appeal.

The defendant in *James* v. *Smith* (June 7, 1921 : reported [1931] 2 K. B. 317, note), wrote to the plaintiff that she was prepared to sell a hotel " for the sum of £31,000, and to pay you a commission of £1,000 if the business is sold at this figure ". The Court of Appeal held that the intention was that the defendant should find a purchaser ready and willing to purchase in the sense of a purchaser able to purchase and able to complete as well. The agent having failed to do this was not entitled to his commission. Atkin, L.J., said in his judgment that he did not think that " ability " to purchase depended upon whether the purchaser had the money in hand at the time : it was sufficient if the agent or the purchaser proved that the circumstances were such that, if the vendor was ready and willing to carry out his contract, the purchaser on his part at the proper time could find the necessary money to perform his obligation

In *Bentall, Horsley and Baldry* v. *Vicary*, [1931] 1 K. B. 253, the plaintiffs were appointed as " sole agents " for the sale of the defendant's property. Before the plaintiffs had been able to negotiate a sale of the property, the defendant personally sold it. The plaintiffs thereupon claimed commission, or, alternatively, damages on the ground that the defendant had broken his contract with them by selling his property personally and thus depriving them of their commission; or, in the further alternative, a reasonable sum by way of *quantum meruit*. Applying *Brinson* v. *Davies*, which he referred to as " a significant decision " ([1931] 1 K. B. 259), McCardie, J., held that the fact that the defendant appointed the plaintiffs as " sole agents " did not prevent him from selling his property himself, and gave judgment for the defendant : compare *Passingham* v. *King* (*supra*). Lord Simon in the *Luxor Case* ([1941] A. C. 117) referred to McCardie, J.'s judgment with approval.

The plaintiff in *Martin* v. *Perry and Daw*, [1931] 2 K. B. 310, instructed the defendants to find a purchaser of his businesses as tobacconist. The arrangement was that the agents were to receive commission " on a sale being effected ". The agents introduced a potential purchaser, who paid a deposit, but failed to complete. The plaintiff sued for the deposit, and the defendants counterclaimed for commission. Charles, J., thought that the effect of the words " on a sale being effected " was much the same as that of the words used in *James* v. *Smith* (*supra*), which he referred to at some length. The learned Judge came to the conclusion that the defendants had not introduced a purchaser who was ready, willing and able to

purchase and able to complete as well, and accordingly gave judgment for the plaintiff on the claim and the counterclaim.

The defendant in *Raymond* v. *Wooten* (1931), 47 T. L. R. 606, instructed the plaintiff to find a purchaser for his house, on the terms that the plaintiff should be sole agent for one month, but that thereafter the agency was to be at large. Five months later the plaintiff introduced a person who was willing to purchase "subject to contract", and the defendant accepted his offer "subject to contract". On the same day the defendant obtained and accepted a better offer through another agent, and withdrew his acceptance of the offer made by the person introduced by the plaintiff. The Divisional Court of the King's Bench Division held that, there being no binding contract with the person whom the plaintiff introduced, the defendant had done nothing which he was not entitled to do, and that the plaintiff was not entitled to commission or damages.

George Trollope & Sons v. *Martyn Brothers*, [1934] 2 K. B. 436, was overruled by the House of Lords in the *Luxor Case*, which approved Scrutton, L.J.'s dissenting judgment. It is to be observed that Greer, L.J., was of the opinion that *Raymond* v. *Wooten* (*supra*) was wrongly decided, but in view of the *Luxor Case*, it seems that the decision of the Divisional Court in *Raymond* v. *Wooten* was correct, though this case was not referred to in any of the speeches in the *Luxor Case*. *George Trollope & Sons* v. *Caplan*, [1936] 2 K. B. 382, in which *George Trollope & Sons* v. *Martyn Brothers* was distinguished, was also disapproved in the *Luxor Case*. Mention should perhaps be made of a Scottish case, *Dudley Brothers & Co.* v. *Barnet*, 1937 S. C. 632, where the Second Division of the Court of Session applied *George Trollope & Sons* v. *Martyn*, because Lord Wark expressed the opinion that the principles enunciated by the majority of the Court of Appeal in the latter case were also principles of the law of Scotland. In view of the *Luxor Case*, it is clear that *Dudley Brothers & Co.* v. *Barnet* is not good law in England, and Slade, J., in *Murdoch Lownie, Ltd.* v. *Newman* (1949), 65 T. L. R. 717 (*infra*), discussed the case at some length and found himself unable to follow it.

The last case before the *Luxor Case* is *Harrod's, Ltd.* v. *Geneen*, [1938] 4 All E. R. 493. In so far as that case accepts the general principle said to be laid down in *Prickett* v. *Badger* but rejected by the House of Lords (*vide supra*), it must, it is submitted, be considered to have been wrongly decided.

Turning now to the cases which have been decided since the *Luxor Case*, the first to be noticed is *Jones* v. *Lowe*, [1945] K. B. 73, to which reference has already been made. It is unnecessary to do

more than to state briefly what it decided. Hilbery, J., applying the observations of the House of Lords in the *Luxor Case*, held that where an agent is to receive commission in the event of his "introducing a purchaser", it is not a sufficient performance of his obligation if he introduces a person who is able, ready, and willing to purchase, but does not enter into a legal and binding agreement to do so, because, after his solicitors have received a draft contract from the vendor's solicitors, the vendor withdraws the property from sale.

As a result of the decision of the House of Lords in the *Luxor Case*, estate agents began to use in their contracts new formulæ which they hoped would ensure their right to commission in a case where there was no binding contract between the owner of the property and the person introduced as a prospective purchaser. One such formula was considered in *Giddys* v. *Horsfall*, [1947] 1 All E.R. 460, which has now been overruled by *Graham and Scott (Southgate), Ltd.* v. *Oxlade*, [1950] 1 All E. R. 856, and *Dennis Reed, Ltd.* v. *Goody and Another*, [1950] 1 All E. R. 919, which also overruled *Dennis Reed, Ltd.* v. *Nicholls*, [1948] 2 All E. R. 914, and *Bennett and Partners* v. *Millett*, [1949] 1 K. B. 362 (*infra*). The agents in *Giddys* v. *Horsfall* sent to their principal printed terms of commission with a covering letter stating that there was enclosed "a copy of our terms of commission which are on the usual scale and which would become payable by you in the event of our being instrumental in introducing a party prepared to purchase on the terms of your instructions or on terms acceptable to you". The agents found a prospective purchaser, who made an offer "subject to contract", but the principal withdrew from the negotiations before the contract was signed.

Lewis, J., held that the agents were entitled to their commission. He referred to the fact that the *Luxor Case* had made it clear that when commission is to be payable in introducing a purchaser the use of the word "purchaser" contemplates a sale, so that, short of a sale, the agent is not entitled to his commission, but pointed out that in the present case the agreement did not say that commission would be payable in the event of the agents introducing "a purchaser", but in the event of their introducing a party "prepared to purchase" on the terms laid down. "In my view", said the learned Judge ([1947] 1 All E. R. 462), "there is a wide difference between a contract which contains a clause 'commission is due on my introducing a purchaser' and 'commission is due on my introducing a person who is ready and willing to purchase on your conditions'. In the latter case, so long as the person produced is a willing purchaser or is prepared

to be a willing purchaser, on the terms set out, the estate agents have earned their commission, whether or not there is a sale to that person."

The important point to notice about *Giddys* v. *Horsfall* is that the prospective purchaser's offer was "subject to contract". These words were again brought into the negotiations in *Dennis Reed, Ltd.* v. *Nicholls*, and *Bennett and Partners* v. *Millett*, and it is on account of the presence of those words that these three cases have since been held to have been wrongly decided. In *Dennis Reed, Ltd.* v. *Nicholls* the agents were instructed to procure "a person able, ready and willing" to purchase. They duly introduced a prospective purchaser, but the house owner subsequently withdrew from the negotiations. Lynskey, J., holding that the agents were entitled to their commission, seems to have based his *ratio decidendi* on the prospective purchaser's ability to purchase, following Atkin, L.J., in *James* v. *Smith* (*supra*). In *Bennett and Partners* v. *Millett* the agents were employed to sell their principal's house on terms that commission should be payable on their introducing "a purchaser who is able and willing to complete the transaction". They found such a person, but the principal subsequently refused to complete. Hilbery, J., held that the agents had performed their obligation so as to be entitled to their commission. It is to be noticed that the word "purchaser" was here used, and it was argued for the principal that the words "who is able and willing to complete the transaction" ought to be taken to be surplusage, and merely otiose, since no person could be a purchaser in the strict sense of the word unless he completed the purchase. Hilbery, J., was of the opinion, however, that the word "purchaser" could not be so strictly construed, and that in the context it did not mean one who had actually completed the purchase; the words objected to did in fact qualify it. It is respectfully submitted that up to this point Hilbery, J., was right.

The next case in chronological order, *Murdoch Lownie, Ltd.* v. *Newman* (1949), 65 T. L. R. 717, was decided by Slade, J., against the agents. Their principal had agreed to pay commission "in the event of business resulting", and the learned Judge held that those words on their true construction required at least that the right to commission should not accrue until the agents had introduced to the principal a person who entered into a binding contract to purchase the property : they certainly did not amount to such "clear and unequivocal language" as Lord Russell of Killowen had spoken of in the *Luxor Case* ([1941] A. C. 129; *vide supra*).

There followed *E. P. Nelson & Co.* v. *Rolfe*, [1950] 1 K. B. 139.

This is an unsatisfactory decision; it has not been overruled, although *Giddys* v. *Horsfall*, *Dennis Reed, Ltd.* v. *Nicholls*, and *Bennett and Partners* v. *Millett*, which it inferentially approved, have been, and it is submitted that it can only be supported on its own very special facts. It is therefore necessary to state in some detail both the facts of the case and the *ratio decidendi* of the Court of Appeal. Later on it will be seen how, in *Graham and Scott (Southgate), Ltd.* v. *Oxlade*, Cohen, L.J., who was a member of the Court in both cases, reconciled two seemingly conflicting decisions of the Court of Appeal.

The defendant in *E. P. Nelson & Co.* v. *Rolfe* instructed agents to offer for sale a bungalow, on the terms that if the agents introduced "a person able, ready and willing to purchase" on his terms, he would pay them commission. On the following day a prospective purchaser, E., sent by other agents, viewed the bungalow, and the defendant granted him an option for twenty-four hours. Later the same day P., sent by the first agents, and being a person able, ready and willing to purchase the bungalow, came to view it. In view of the option which he had granted to E., the defendant refused to sell to P. It was contended for the defendant, first, that commission was payable only in respect of the first introduction by any agent, and, secondly, that if the owner of property offered for sale should take it off the market (without informing his agents) "justifiably", in the sense that he felt bound to do so morally, or to comply with good business standards (because, for example, there was, as in this case, an arrangement with a prospective purchaser, although the property had not been sold to him), no commission should be payable in respect of a subsequent introduction. The Court of Appeal (Bucknill, Cohen and Asquith, L.JJ.) held that the contract between the defendant and the agents was not subject to either of the suggested implied terms, since neither was necessary, in the business sense, to give efficacy to the contract, and that, accordingly, the agents were entitled to their commission. Cohen, L.J., was of the opinion that this case fell into the first of the three classes into which Lord Simon in the *Luxor Case* divided contracts with estate agents.

The agreement in *Fowler* v. *Bratt*, [1950] 1 All E. R. 662, was, as the Court of Appeal (Sir Raymond Evershed, M.R., Denning and Jenkins, L.JJ.) decided, that the agent in order to earn his commission should find a purchaser, bound in law to pay, of the defendant's property. This the agent did, but the defendant did not complete the transaction. The Court held that the agent was entitled to his commission, and the Master of the Rolls referred to and applied Lord Russell of Killowen's *dictum* (referred to *supra*)

in the *Luxor Case*, where he considers the position where a binding contract has been made between the owner of property and the purchaser found by the agent. The Master of the Rolls said that it was unnecessary in the present case to decide whether, for the agent to succeed in his claim, his principal should be bound in law : the position when the prospective purchaser withdraws from the negotiations after becoming bound in law came to be considered in *Dennis Reed, Ltd.* v. *Goody and Another*, [1950] 1 All E. R. 919 (*infra*).

The agents in *Graham and Scott* (*Southgate*), *Ltd.* v. *Oxlade* wrote to their principal, who had instructed them to negotiate the sale of his property, as follows : " We beg to confirm and thank you for your instructions to assist in the disposal of your property . . . . We confirm that in the event of our introducing a person or persons willing and able to purchase we shall look to you for the payment of the usual commission . . . ". The principal accepted these terms, and the agents introduced a person who was prepared to purchase the property " subject to contract [and] satisfactory survey ".

Roxburgh, J., in the King's Bench Division ([1950] 1 All E. R. 91), intimated that, had he not been bound by authority (he presumably had in mind *Giddys* v. *Horsfall*), he would have found that any offer which was not a firm offer capable of acceptance so as to constitute a contract would not establish that the person making the offer was willing to purchase. As it was he found himself able to distinguish the present case from those where the words " subject to contract " were used in the agreement, because here the words were " subject to satisfactory survey ". The Court of Appeal (Cohen, Asquith and Singleton, L.JJ.) held, affirming Roxburgh, J.'s decision, that proof of an offer by a prospective purchaser on a condition which left him free at his will, even if the offer were accepted, not to proceed with the purchase, was not evidence that he was a person able and willing to purchase, and, therefore, the agents had not discharged the *onus* which rested on them of proving that the person whom they had introduced was willing to purchase the property, so that their claim must fail. Cohen, L.J., did not think that there was any real difference in the effect of the words " subject to contract " and " subject to survey ", because under a provision " subject to contract " an intending purchaser could refuse to sign a contract if he was dissatisfied with a survey.

As stated above, Cohen, L.J., distinguished this case from *E. P. Nelson & Co.* v. *Rolfe*. Referring to the latter, he said ([1950] 1 All E. R. 860, 861): " The question of the effect of the

words ' subject to contract ' does not appear to have been discussed and the question did not arise on the facts of the case. As I read the judgment, we were in that case only relying on the decisions cited as authority for the proposition that the mere fact that the person introduced did not actually purchase the property did not preclude the agent from recovering commission. *E. P. Nelson & Co.* v. *Rolfe* carried the matter a stage further in that it established that the fact that the person introduced had not actually made an offer was not fatal to the agents' claim. It is not, however, in my opinion, any authority for the proposition that an offer on a condition which leaves the offeror free at his will, even if the offer is accepted, not to proceed with the purchase is evidence that the offeror is a person able and willing to purchase. The only case which supports this proposition is that of *Giddys* v. *Horsfall*, and that case is not binding on us. I am unable to agree with it. In reaching my conclusion I am not saying that the introduction into the preliminary arrangements of the expression ' subject to contract ' would necessarily in all cases prevent the agent establishing that the person he introduced was willing to purchase. It clearly would not be fatal to the agent's claim if it was introduced by the vendor in accepting an unqualified offer, but, if it was introduced by the prospective purchaser, the normal inference would be that he did so with a view to reserving to himself a *locus pœnitentiæ*, conduct which seems to me inconsistent with the view that he is a willing purchaser." " . . . I think that the agent may prove that a person he has introduced is willing to purchase the property by showing that that person has made an unqualified offer or expressed an unqualified intention to make an offer notwithstanding that such an offer until accepted could be withdrawn. On the other hand, if the evidence shows that the offer is qualified by a condition inserted to prevent the other party turning the offer into a contract by acceptance, I think it is impossible to say that the agent has discharged the *onus* which rests on him of proving that the person he has introduced was willing to purchase the property."

In his Lordship's opinion the agent only succeeded in *E. P. Nelson & Co.* v. *Rolfe* because it was not disputed that the offeror was a person able, ready and willing to purchase the property, and had the evidence indicated that he had not expressed his willingness to buy when he inspected the property, the decision might, his Lordship thought, well have been the other way. In the present case, on the other hand, although there was some evidence that the offeror was keen on purchasing, she had never made an unqualified offer and her anxiety to purchase was qualified by the condition, " subject to satisfactory survey ". Such an offer meant

that the offeror had constituted herself the arbitrator whether the survey was satisfactory, and the owner could not by accepting her offer constitute a binding contract. Consequently, the agents had not established that the offeror was a person willing to purchase the property.

Graham and Scott (Southgate), Ltd. v. *Oxlade* was followed by the Court of Appeal (Bucknill and Denning, L.JJ., and Hodson, J.) in *McCallum* v. *Hicks*, [1950] 1 All E. R. 864. The defendant instructed the plaintiff to " find someone to buy my house ". The plaintiff found a prospective purchaser who agreed to buy " subject to formal contract ", but the defendant subsequently refused to complete. Denning, L.J., said that *Graham and Scott (Southgate), Ltd.* v. *Oxlade* had shaken the authority of previous cases and opened the way to an interpretation of the words " find a person able, ready and willing to purchase " so as to give them the same effect as " find a purchaser ". He went on to say ([1950] 1 All E. R. 866) : " A person may not properly be said to be ' willing ' to purchase so as to entitle an agent to commission unless he is irrevocably willing, that is, unless he has given irrevocable proof of his willingness by entering into a binding contract to purchase ". His Lordship came to the conclusion that this statement was incorrect when, shortly afterwards, *Dennis Reed, Ltd.* v. *Goody* came before the Court of Appeal (similarly constituted). The real reason, he said ([1950] 1 All E. R. 923), why the vendor was liable in a case where a contract had been signed was because, once he repudiated the contract, the purchaser was no longer bound to do any more towards completion, and, because it was due to his own fault, the vendor could not rely on the non-completion in order to avoid payment of commission. He referred to the speeches of Lord Russell of Killowen and Lord Wright in the *Luxor Case* where they consider the position when a binding contract has been entered into between the vendor and the purchaser (*vide supra*).

The plaintiffs in *Dennis Reed, Ltd.* v. *Goody* were promised commission " upon their introducing " a person ready, able and willing to purchase the defendants' property. They introduced a prospective purchaser, who made an offer acceptable to the defendants, but then withdrew it. The judgments in this case contain some valuable *dicta* and must be referred to at some length.

Bucknill, L.J., was of the opinion that the fatal defect in the plaintiffs' claim in this case was that it was the prospective purchaser and not the defendants, who withdrew from the negotiations. " On the other hand ", he said ([1950] 1 All E. R. 922), " the plaintiffs' claim to commission is, in my opinion, not established merely by showing that . . . the person whom they introduced

was able and willing to purchase the property at any one particular moment of time. They must prove that he was ready, able and willing to purchase up to the time when an enforceable contract for the purchase of the house was made between the parties, or, alternatively, up to a time when the defendants refused to enter into such a contract on terms on which [the prospective purchaser] was willing to purchase and the defendants were at one time willing to sell."

Denning, L.J., stated what was the general law, namely, that when a house owner put his house into the hands of an estate agent, the ordinary understanding was that the agent was only to receive a commission if he succeeded in effecting a sale. All the familiar expressions—for example, " please find a purchaser ", " find someone to buy my house ", or " sell my house for me "—meant the same thing, namely, that the agent was employed on the usual terms, but none of them gave any precise guide as to what was the event on which the agent was to be paid. He continued ([1950] 1 All E. R. 923) : " The common understanding of men is, however, that the agent's commission is payable out of the purchase price. The services rendered by the agent may be merely an introduction. He is entitled to commission if his introduction is the efficient cause in bringing about the sale . . . , but that does not mean that the commission is payable at the moment of the introduction. It is only payable on completion of the sale. The house owner wants to find a man who will actually buy his house and pay for it. He does not want a man who will only make an offer or sign a contract."

On the question of the consequences when the prospective purchaser, as opposed to the owner of the property, withdrew from the negotiations, Denning, L.J., was of the same opinion as Bucknill, L.J. Indeed, he went even further than Bucknill, L.J., did saying that if the owner could show that the prospective purchaser would not, in any event, have been able or willing to complete he would not be liable for commission : here he appears to contemplate the owner taking the first step in withdrawing from the agreement. As regards the position when no binding contract has been made, his Lordship pointed out that it was clear from the *Luxor Case* that the owner could himself withdraw at any time without being liable to pay commission, and, *a fortiori*, if the prospective purchaser withdrew, the owner would not be liable.

The words " upon your introducing " were interpreted by Denning, L.J., as meaning " in consideration of your introducing " : this interpretation, he said, meant that the words had practically the same effect as the usual terms on which an estate agent was

employed. Hodson, J., also interpreted this phrase in a causal sense, and not temporally.

In *Bennett, Walden & Co.* v. *Wood*, [1950] 2 All E. R. 134, the plaintiff agents claimed commission on " securing an offer " for the defendant's property. They had introduced a potential purchaser, who had signed an agreement to buy the property, subject to contract, but the owner subsequently did not proceed to completion. The Court of Appeal gave judgment for the defendant. Sir Raymond Evershed, M.R. (with whom Asquith and Jenkins, L.JJ., agreed) distinguished the formula " securing an offer " from the formulæ considered by Denning, L.J., in *Dennis Reed, Ltd.* v. *Goody*, and proceeded to consider exactly what the words meant. He said ([1950] 2 All E. R. 137): " Applying the proper test of construction, *viz.*, what is the ordinary, straightforward, meaning of the language, it seems to me reasonably clear that the answer here is that by ' offer ' is meant a firm offer. In the ordinary sense of the term in business matters an offer is something which by acceptance creates a bargain. An offer subject to contract lacks that essential characteristic, for its acceptance does not create a contract. *Prima facie* when the word ' offer ' in such a document as this is used, what is meant is something, which, if accepted, gives rise to a contractual relationship. I think that that view is supported by the use of the word ' securing '—making sure—for something which amounts to no more than a step in the negotiations provides no kind of assurance or security for the principal."

A little further on in his judgment the Master of the Rolls said: " It seems to me, therefore, tolerably plain that by ' offer ' is here meant what I have described as a firm offer. I do not think the result of that is necessarily to produce the same result as would have been produced had the words been ' find a purchaser '. I am not saying what would be the precise result if a firm offer had been made here and for one reason or another the contract so confirmed had broken down at a later stage. I certainly do not, as at present advised, assent to the view that the construction I put on this document makes this formula synonymous with the other formulæ I have mentioned."

Having considered the cases, it is now possible to group them in accordance with the three classes of case enumerated by Lord Simon. It is also possible to extract certain principles from the decisions and *dicta* of the learned Judges.

Turning first to the grouping of cases in accordance with Lord Simon's three classes, it is submitted that they are properly grouped as follows :—

CLASS 1

E. P. Nelson & Co. v. *Rolfe.*

CLASS 2

Inchbald's Case; *Roberts* v. *Barnard*; *Passingham* v. *King*; and *Nosotti* v. *Auerbach.* Also *Prickett* v. *Badger*, but only on its own special facts.

CLASS 3

(a) Cases prior to the *Luxor Case*—

(i) Cases correctly decided—

Simpson v. *Lamb*; *Green* v. *Mules*; *Grogan* v. *Smith*; *Lott* v. *Outhwaite*; *Beale* v. *Bond* (wrongly decided on one point); *Millar, Son, and Co.* v. *Radford*; *Chapman* v. *Winson*; *Brinson* v. *Davies*; *Nightingale* v. *Parsons*; *James* v. *Smith*; *Bentall, Horsley and Baldry* v. *Vicary*; *Martin* v. *Perry and Daw*; and *Raymond* v. *Wooten.*

(ii) Cases which appear to fall within this class, but to have been wrongly decided—

Taplin v. *Barrett*; *Martyn's Case*; *Caplan's Case*; and *Dudley Brothers & Co.* v. *Barnet.* Also, probably, *Harrod's, Ltd.* v. *Geneen*, but perhaps this is more properly included under Class 2 as (like *Prickett* v. *Badger*) turning on special facts.

(b) Cases subsequent to the *Luxor Case*—

(i) Cases correctly decided—

Jones v. *Lowe*; *Murdoch Lownie, Ltd.* v. *Newman*; *Graham and Scott (Southgate), Ltd.* v. *Oxlade*; *McCallum* v. *Hicks*; *Dennis Reed, Ltd.* v. *Goody*; and *Bennett, Walden & Co.* v. *Wood.* Also *Fowler* v. *Bratt*, the transaction having there been completed within the meaning of Lord Russell of Killowen's *dictum* in the *Luxor Case.*

(ii) Cases held to have been wrongly decided—

Giddys v. *Horsfall*; *Dennis Reed, Ltd.* v. *Nicholls*; and *Bennett and Partners* v. *Millett.*

In order to see what principles can be extracted, it is necessary to consider only the *Luxor Case* and the cases subsequent to it. On analysis the following principles appear :—

(1) Where by the express language of the contract the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about between his principal and the offeror he will not earn his commission unless the event contemplated actually happens. (The *Luxor Case.*)

(2) The use of the word " purchaser " in the agreement between

principal and agent contemplates a sale, so that, short of a sale, the agent is not entitled to his commission. (The *Luxor Case*.) But this is subject to (4), *infra*. " Please find a purchaser ", " find someone to buy my house " and " sell my house for me ", all mean the same thing; none of them give precise guidance as to the event in which the agent is to be paid, but the common understanding of man is that commission is payable out of the purchase price. (*Dennis Reed, Ltd.* v. *Goody*, *per* Denning, L.J.)

(3) The transaction referred to in (1), *supra*, is completed when there is a binding contract between the principal and the offeror, so that the offeror is bound in law to pay. (*Dicta* of Lord Russell of Killowen and Lord Wright in the *Luxor Case*; see also *Jones* v. *Lowe* and *Fowler* v. *Bratt*.)

(4) Where there is such a binding contract, and the principal repudiates it, so that the offeror is excused from completing it, the principal will not be allowed to rely on his own fault to avoid paying commission to the agent. (*Dennis Reed, Ltd.* v. *Goody*, *per* Denning, L.J.) In this case, therefore, commission is payable short of a sale.

(5) If, however, there is such a binding contract, and the offeror repudiates it, the principal is not liable to his agent. (*Dennis Reed, Ltd.* v. *Goody*.)

(6) Where the agent is promised his commission if he succeeds in introducing to his principal a person who makes an adequate offer, the agent is entitled to be paid when he has introduced such a person, whether or not the principal accepts the offer and carries through the bargain. (The *Luxor Case*, *per* Viscount Simon, L.C.)

(7) There must, however, be " clear and unequivocal language " before the principal can be said to have bound himself to pay commission on the mere introduction of a person who offers to purchase. (*Dictum* of Lord Russell of Killowen in the *Luxor Case*.)

(8) Moreover, for the agent to be entitled to commission, the person introduced must be able, ready and willing to purchase, and if he introduces conditions, such as " subject to contract " or " subject to satisfactory survey ", so as to be free at his will, even if the offer is accepted, not to proceed with the purchase, a claim by the agent for commission will fail. (*Graham and Scott (Southgate), Ltd.* v. *Oxlade*; *vide* also *McCallum* v. *Hicks*. *Giddys* v. *Horsfall*; *Dennis Reed, Ltd.* v. *Nicholls*; and *Bennett and Partners* v. *Millett* overruled.)

(9) If the agent is to be entitled to commission if he introduces a person able, ready and willing to purchase, his right will not be affected if his principal, in accepting an unqualified offer, himself

puts in the qualification " subject to contract ", and, furthermore, the agent need only show that the prospective purchaser has made an unqualified offer, or expressed an unqualified intention to make an offer, and it does not matter that the offer, until accepted, can be withdrawn. (*Dicta* of Cohen, L.J., in *Graham and Scott (Southgate), Ltd.* v. *Oxlade*; *vide* also *E. P. Nelson & Co.* v. *Rolfe*, where the agent succeeded in his claim because it was not disputed that the prospective purchaser was able, ready and willing to purchase the property.)

(10) If the agreement is that the agent shall introduce a person able, ready and willing to purchase, the agent will not be entitled to his commission unless he can prove that the person introduced was able, ready and willing to purchase up to the time when an enforceable contract between the parties came into existence, or, alternatively, up to a time when the principal refused to enter into such a contract on terms on which the prospective purchaser is willing to purchase and the principal was at one time willing to sell. (*Dennis Reed, Ltd.* v. *Goody, per* Bucknill, L.J.)

(11) If there is no binding contract between the principal and the prospective purchaser, the principal can safely withdraw from the negotiations at any time without rendering himself liable to pay commission; *a fortiori*, if the prospective purchaser withdraws, the principal will not be liable. (The *Luxor Case*; *Dennis Reed, Ltd.* v. *Goody, per* Denning, L.J.)

(12) If there is a binding contract, and the vendor can show that the prospective purchaser cannot complete, the vendor can safely withdraw. (*Dennis Reed, Ltd.* v. *Goody, per* Denning, L.J.)

(13) The words " upon your introducing " must be construed causally, not temporally. (*Dennis Reed, Ltd.* v. *Goody, per* Denning, L.J., and Hodson, J.)

(14) A promise to pay commission " in the event of business resulting " is not a promise in " clear and unequivocal language ". (*Murdoch Lownie, Ltd.* v. *Newman.*)

(15) " Securing an offer " means securing a firm offer, that is, something which by acceptance creates a bargain; but it does not mean the same as " finding a purchaser ". (*Bennett, Walden & Co.* v. *Wood, per* Sir Raymond Evershed, M.R. The Master of the Rolls did not have to decide what the result would be if a firm offer was made and the contract then broke down at a later stage: it is submitted that it would probably be the same as if the agent had introduced a person able, ready and willing to purchase who had made an offer or showed an unqualified intention to make an offer; *vide* (9), *supra.*)

(16) Where property is put into the hands of an agent to

dispose of it for the owner, and the agent accepts the employment, and possibly expends money and time on his principal's interests, there may be an implied term that the principal will not withdraw his authority. (The *Luxor Case*, *per* Viscount Simon, L.C.)

It must, of course, always be remembered that in contracts between owners of property and estate agents it is—in accordance with the usual principles of the law of contract—for the parties to make their own terms. But it is for the Court to interpret these terms and the Court's interpretation will be in accordance with the ordinary understanding of men and ordinary fairness : it is thus that the principles enumerated above have been evolved. If, therefore, the parties intend, for example, that the terms shall be more than ordinarily favourable to the estate agent, they must set them out in the "clear and unequivocal language" referred to by Lord Russell of Killowen in the *Luxor Case*. They must bear in mind the fact that the Court will (as Lord Simon pointed out in the *Luxor Case*) consider in the first place the express terms of the contract, and then consider whether those express terms necessitate the addition, by implication, of other terms; and they must remember the principle of construction that, in the event of ambiguity, a contract will be construed *contra proferentem*.

PUBLIC SEWERS IN PRIVATE STREETS—
Two Practical Points

By J. F. Garner, LL.M., Solicitor

It frequently occurs in practice that the sewer serving a private estate is laid under the surface of a private street that has not been taken over by the local highway authority. If the sewer had been constructed prior to October 1, 1937 (*a*), it will normally be a public sewer vested in the local sanitary authority; this will also be the case if the sewer has been constructed after that date and has been adopted as a public sewer by the local authority (*b*), or was so constructed under the provisions of the Public Health Act, 1875, s. 150, or the corresponding provisions of the Private Street Works Act, 1892 (*c*). Assuming that the sewer in question is a public one, the owner of premises in the neighbourhood (*d*) is entitled to " have his drains or sewer made to communicate " with such public sewer (*e*), and it is generally assumed that this provision in the Public Health Act, 1936, should not cause any practical difficulty.

In certain circumstances, however, very considerable difficulties may arise, and the point explained below is one which, it is submitted, should be watched by conveyancers acting in a purchase of property on cesspool drainage in a private street.

The right to connect to a public sewer is essentially one given against the local sanitary authority, the owners of the sewer, and the statute cannot be read so as to override private rights. Thus, if the route from the premises to be connected to the sewer and the sewer itself lies through a parcel of intervening land belonging to a third person, in respect of which no easement or other right of drainage is enjoyed, the statute does not justify a trespass being

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(*a*) The date on which the Public Health Act, 1936, came into operation: see s. 347 (1) thereof.

(*b*) Under s. 17 of the Public Health Act, 1936.

(*c*) The law relating to the vesting of sewers in the local authority is contained in s. 20 of the Public Health Act, 1936, and " public sewer " is defined by s. 20 (2) thereof as referring to any sewer so vested. The earlier law was contained in the Public Health Act, 1875, mainly in s. 13 thereof.

(*d*) The premises need not necessarily adjoin or abut on the street, as *any* premises may be so connected.

(*e*) Public Health Act, 1936, s. 34(1).

committed against the property of such third person (*f*). Where the frontager to a private street owns the soil in the highway *ad medium filum*, under the normal presumption, such not being excluded by his title deeds (*g*), and the sewer is laid in the centre of the street (or on his side thereof), no difficulty arises; but where the soil in the highway has been excluded from the house-owner's conveyance (or where the sewer is laid in the opposite side of the street), it seems that the consent of the owner of the subsoil to the making of the communication will have to be obtained.

Sub-section (2) of section 34 of the Public Health Act, 1936, entitles any owner or occupier of any premises to break open a street for the purpose of exercising his rights under the section, subject to compliance with the appropriate procedure for the time being in force as to the giving of notices, etc. (*h*), but this sub-section appears to be merely machinery, and does not give any right to use the subsoil, or any property therein, such as would be required for the purpose of laying the communicating drain or sewer. A comparatively thin "crust" or vertical section of the street only is vested in the local highway authority in the case of a highway repairable by the inhabitants at large (*i*), and it is this crust, it is submitted, which the section permits a landowner or occupier to break up. The term "street", as used in the Act (*j*), includes both a public and a private street, provided it is a "highway", but the term would seem, in the vertical plane, only to refer to this crust, even in the case of a private street, and not to the whole subsoil *ad inferos*. In any event, a power to "break open" cannot, without specific mention, confer as against a third person a right to lay in that person's land, and to maintain therein the desired communicating drain or sewer; the terms of sub-section (2) are not wide enough so to enlarge the power given by sub-section (1).

The situation above described is not likely to be of great

(*f*) Private rights cannot be deemed to have been prejudiced unless the terms of the statute were clearly so intended. Even a local authority making the communication themselves under s. 36 of the Act have only the powers of the owner of the premises, and if he has no rights to drain through the intervening land, the local authority would not be so justified: *Wood* v. *Ealing Tenants, Ltd.*, [1907] 2 K. B. 390.

(*g*) As in, *e.g.*, *Mappin* v. *Liberty & Co.*, [1903] 1 Ch. 118.

(*h*) See Public Health Act, 1936, s. 34 (2) and s. 279 (1), as amended by the Fourth Schedule to the Water Act, 1945, which incorporates into the 1936 Act certain provisions as to the topic contained in the Third Schedule to the same statute. These provisions will themselves be repealed when the Public Utilities Street Works Bill, now before Parliament, comes fully into operation.

(*i*) This "crust" is of sufficient thickness only to permit the local highway authority to perform their functions as such; a principle which seems to follow from such decisions as *Stillwell* v. *New Windsor Corporation*, [1932] 2 Ch. 155.

(*j*) See definition in s. 343 (1) of the 1936 Act.

importance where the only consent required is that of another frontager to the street, as, provided proper reinstatement is effected, any damages which could be proved to have been sustained in the event of the communication being laid without first obtaining the necessary consent, are not likely to be large. Where, however, the property in the street has been retained by the original landowner (*e.g.*, by the estate company originally responsible for the laying out of the estate), the penalty for disregarding the need to obtain consent may be considerable. In a case of which we have heard, where feelings were running somewhat high for extraneous reasons, the landowner of the street concerned threatened proceedings for an injunction, which he would probably have been successful in obtaining, had such proved necessary.

These difficulties may even arise where the street is a highway repairable by the inhabitants at large. The owner of the subsoil of such a street, where it is not owned *ad medium filum* by the frontagers, is often unknown, but if such an owner had retained an active (as well as a legal) interest in the subsoil, it may be desirable (and legally necessary) to obtain his consent before the sewer communication is made. The appropriate notices will have to be served on the highway authority, in order to claim the benefit of section 34 of the 1936 Act as above mentioned, but it is submitted that once again that section alone will not suffice.

To turn to another point which frequently arises in practice, but does not always attract the attention of practitioners that it deserves, there is no provision in the Public Health Acts whereby a local authority can compel the owner or the occupier of a dwelling-house to cause his house drains to be connected to the public sewer, at his expense (*k*). The authority may resolve, under section 150 of the Public Health Act, 1875, or the Private Street Works Act, 1892, to provide a sewer for the drainage of premises fronting or abutting on a private street (*l*), and their expenses thereby incurred will become chargeable against the frontagers. The " laterals ", or communicating drains between the individual premises and the sewer, cannot, however, be included in such works, nor are the costs thereof properly included in the authority's private street

(*k*) Under s. 42 of the Public Health Act, 1936, however, the local authority are empowered *at their expense*, to alter the drainage system of particular premises, and to order a cesspool to be filled up, provided some other equally effectual drain or sewer is available for the premises. In the last session of Parliament, the Eton R. D. C. obtained a local Act enabling them to require a connection to be made to a public sewer from premises within 100 ft. thereof, at the expense of the owner.

(*l*) The private street in question must be one which is not already sewered to the satisfaction of the local authority: *Bonella* v. *Twickenham Local Board* (1887), 18 Q. B. D. 577.

works expenses—they are the responsibility of the owners, or occupiers, of the premises concerned—but there is no provision whereby the authority can enforce their provision. The local authority having constructed the sewer under this legislation (*m*), they will not therefore, of necessity secure the abolition of all cesspools (or other receptacles for drainage) used at the various premises in that street (*n*). Those authorities who operate a cesspool emptying service under section 72 of the Public Health Act, 1936, sometimes exert "pressure" on reluctant householders to abolish their cesspools, by rescinding their undertaking under the section to empty cesspools in named streets that are adequately sewered (*o*), but there is still no legal provision preventing such a householder from continuing to use his cesspool (*p*), provided he does not allow it to get into such a state as to be or become prejudicial to health or a nuisance (*q*).

(*m*) Once a sewer has been constructed under these provisions, it becomes a public sewer, and so vests in the local authority and will be maintainable by them: Public Health Act, 1936, ss. 20 (1) (*d*), and 23.

(*n*) This will normally have been the expressed objective of the local authority in deciding to provide the sewer.

(*o*) The undertaking has no contractual effect, and so may be rescinded at any time, although the authority may not pick and choose between individual properties in executing their powers under the section: *Pegg & Jones, Ltd.* v. *Derby Corporation*, [1909] 2 K. B. 511, and *Whitbread & Co., Ltd.* v. *Staines R. D. C.*, [1925] Ch. 89.

(*p*) Subject to s. 42 of the Act; *supra*, note (*k*).

(*q*) See Public Health Act, 1936, s. 39, and the "nuisance clauses" of the same Act (*i.e.*, ss. 92–100).

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Estate agent's commission.—In *Bennett, Walden & Co.* v. *Wood*, [1950] 2 All E. R. 134, the Court of Appeal held that when an agent was entitled to his commission on "securing . . . an offer", this meant a firm offer, and thus did not include finding a potential purchaser who merely signed an agreement subject to contract. The Master of the Rolls said, following Lord Simon, L.C., and Lord Russell of Killowen in *Luxor (Eastbourne), Ltd.* v. *Cooper*, [1941] 1 All E. R. 47, that this type of agent's contract, where the language was clear and unequivocal, was in a different category to those where the obligation was to pay on "finding a purchaser" or "finding a person willing and able to purchase".

Trust for sale—forfeiture.—*Re Oppenheim's Will Trusts*, [1950] 2 All E. R. 86, was a case on the operation of a forfeiture clause on the appointment of a receiver in lunacy. The interest of the beneficiary, who had become insane two years after it vested, was to continue as long as "he shall be able to give a personal discharge" for the income. Harman, J., applied *Re Marshall*, [1920] 1 Ch. 284 (which has been upheld recently in *Re Westby's Settlement*, [1950] 1 All E. R. 479 (noted, *ante*, p. 178) on a different point) where Eve, J., said that a receiver in lunacy is strictly speaking the statutory agent of the lunatic. Harman, J., therefore, held in this case that the lunatic could give a personal discharge by his "agent" "even as, *e.g.*, if he were on the top of Mount Everest, his banker could give a personal discharge on his behalf". If a mortgagee appointed a receiver, presumably, the same point would apply. Until the mortgagee realised his security or went personally into possession, would there be any forfeiture?

Perpetuity—vested interest too remote—"issue"—indefinite gift of income.—The Court of Appeal have affirmed for the same reasons [[1950] 2 All E. R. 292] Romer, J.'s judgment in *Re Mill's Declaration of Trust*, [1950] 1 All E. R. 789, noted *ante*, p. 176.

County court jurisdiction—specific performance.—There was an interesting point of construction of the County Courts Act, 1934, in *Bourne and Anor.* v. *McDonald*, [1950] 2 All E. R. 183. The parties had agreed to settle a previous action concerning the boundaries of their respective plots of land. The defendants failed to perform their part of the agreement and this action was brought claiming (*inter alia*) specific performance of the agreement. The County Court Judge held that he had no jurisdiction to award specific performance, which was limited by section 52 (1) (*d*) of the County Courts Act, 1934, to agreements for the sale, purchase or lease of property only. The Court of Appeal held, however, that as the action was based on contract and covered by section 40 of the Act, the Judge could, under section 71, give any remedy as would be granted in the like case by the High Court. He could therefore grant a mandatory order or injunction, whether applied for in that form or as "specific performance", which would amount to the same thing. The Master of the Rolls pointed out that section 52 applies to Equity proceedings; "it would be capricious", he said, "that by giving a jurisdiction . . . in some cases to grant specific performance of some types of contract, the Legislature is thereby preventing the County Court Judge from ordering the specific performance of any other type of contract".

Trust and trustee—sale of property—overriding duty to obtain best price.—In *Buttle* v. *Saunders and Anor.*, [1950] 2 All E. R. 193, trustees holding on the statutory trusts for sale were at an advanced stage of negotiation for the sale of some of the trust property, when they received a higher offer from one of the beneficiaries. This they refused, feeling bound by commercial morality to accept the earlier offer. However, Wynn-Parry, J., held they had acted on an incorrect principle. While the trustees in a case like this might pray in aid that a bird in the hand was worth two in the bush, and might in some circumstances be

justified in holding to the earlier offer, yet, the correct solution depended on the facts of each case, and here the two prospective purchasers were both very anxious to buy. The trustees should have sounded the second offer and accepted on securing a promise of immediate performance. The duty to obtain the best price for trust property must in other words override the scruples which a trustee would feel in dealing with his personal affairs. All possible benefit must be obtained for the beneficiaries even though the credit of the trustee might be diminished as a result.

Settlement—application of capital money to purpose not authorised by the trust instrument.—The Court of Appeal in *Re White-Popham Settled Estates*, [1936] 2 All E. R. 1486 (noted *ante*, Vol. I, p. 256), overruling Eve, J., at first instance, held that the Court had jurisdiction to approve a scheme under section 64 of the Settled Land Act, 1925, where the transaction was for the benefit of the persons interested under the settlement, notwithstanding that the settled land was diminished thereby. This case was applied by Harman, J., in *Re Mount Edgcumbe Settled Estates*, [1950] 2 All E. R. 242. The testator settled his mansion (*inter alia*). The chattels therein (such as were not previously disposed of and were not unsuitable) were to devolve as heirlooms along with the settled estates. The mansion and its contents were destroyed by enemy action. The War Damage Commission determined compensation by a cost-of-works payment on part of the mansion, and in respect of the contents which had been insured under the private chattels scheme pursuant to the War Damage Act, 1941, a maximum payment of £10,000 was received by the trustees and held as capital moneys under the Settled Land Act, 1925. It was proposed to rebuild a part of the mansion, but the tenant for life could not afford to furnish it. Harman, J., held that the Court had jurisdiction under section 64 of the Settled Land Act, 1925 (as it would be for the benefit of the persons interested who had as far as possible consented) to authorise the application, when the mansion was built, of not more than £10,000 in the purchase of furniture suitable to be retained as heirlooms.

Member's club—liability of management committee for breach of warranty of safety of club premises.—The rather obscure position of the management committee of a club has recently

received some elucidation from the Court of Appeal in *Shore* v. *Ministry of Works and Ors.*, [1950] 2 All E. R. 228, heard at first instance by Lynskey, J., at Bristol Assizes. The committee of a member's club were sued for breach of warranty by a member who had been hit on the head by a falling brick during an entertainment on the club premises. The plaintiff alleged that there was an implied warranty in her contract of membership that the premises should be as safe as reasonable skill and care could make them, and that the warranty had been broken. The Court held that such an implied warranty could not be read into the contract. The contract was made with all the members of the club, represented by the committee, for admission to membership under the rules mentioned in their constitution. The plaintiff, as a result, enjoyed all rights in common with the other members, including a licence to use the premises. The Court distinguished *McLenan* v. *Segar*, [1917] 2 K. B. 325, and *Hall* v. *Brooklands Auto-Racing Club*, [1933] 1 K. B. 205, Singleton, L.J., stressing that here there was no "agreement for a reward" that the plaintiff might enter the premises. Jenkins, L.J., expressed the opinion that if it had been a proprietary club and the proprietors had admitted the plaintiff for a reward, the result might well have been different.

It is interesting that the whole case was placed in contract, and there was no allegation of negligence.

Sale of land—Agency and Statute of Frauds, 1677, *s.* 4—*specific performance and undivided shares in land.*—Since the dictum of Luxmoore, L.J., in *Smith-Bird* v. *Blower*, [1939] 2 All E. R. 406, there has been some doubt as to whether a party signing in his own name while acting as agent for another, can fulfil the requirements of section 4 of the Statute of Frauds, 1677, when the other party knows of his agency. This has been settled affirmatively by the Judicial Committee in *Abdul Karim Basma* v. *Weekes*, [1950] 2 All E. R. 146, where the older authorities *Higgins* v. *Senior* (1841), 11 L. J. Ex. 199, and *Calder* v. *Dobell* (1871), L. R. 6 C. P. 486, which were not cited in *Smith-Bird's Case*, were adhered to. The logical reason for this is that the agent does not cease to be contractually liable because it is proved that the other party knew of his agency, therefore an agreement in the agent's name does not cease to contain the names of the contracting parties and satisfy the terms of the statute.

The Judicial Committee also decided, following *Horrocks* v. *Rigby* (1878), 9 Ch. D. 180, that where the legal estate in land

can be owned in undivided shares (as in Sierra Leone), and there are no special circumstances which make it wrong to grant it, specific performance may be awarded against one or more tenants in common where the other tenants in common of the same land (all of whom have entered into a contract for sale) are unable to complete the conveyance.

Perpetuity—perpetual annuity—validity of gift to unincorporated body.—In *Re Jones*, [1950] 2 All E. R. 239, the testator, who died in 1936, made a will giving certain annual sums to specified societies, some of which were charities and some of which were unincorporated. The residue was given on certain trusts with power to postpone sale for three years if the trustees were unable to dispose of the testator's foreign estate. When his foreign estate was realised, he directed that certain capital sums should be substituted for the annual sums previously given. The foreign estate was still unrealised at the date of the trial.

Danckwerts, J., held firstly, that the gift of the capital sums was to take effect on an uncertain event not necessarily within the perpetuity period, and was therefore void. Secondly, he held that the annual sums were clearly perpetual annuities, and there seemed to be no rule of law which prevented a perpetual annuity, any more than any other type of property, being owned by an unincorporated body, whether charitable or not. The non-charitable unincorporated societies could if they wished claim to have the capital value of their annuities, and this avoided the question of a perpetual gift.

The first point shows how easy it is to make a gift vest on an uncertain event, and thereby make it void. The learned Judge held that the testator had anticipated realisation at the latest within three years from his death, but he had not made this a condition of the gift itself.

It appears from the reports that there was no discussion as to whether the substituted gifts to the *charitable* societies were outside the perpetuity rule altogether. It would seem that there is some weight to this argument. *Re Mander*, [1950] 2 All E. R. 191, could be distinguished on the ground that the income arising from the substituted capital sums was vested in the charities at once under the earlier disposition.

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2. *CHARITIES*

Gift "for the benefit" of a hospital—vesting under National Health Service Act after will and before death.—In *Re Morgan's Will Trusts*, [1950] 1 All E. R. 1097, it was argued that a gift "for the benefit of" a hospital failed, because the building, investments and management were altered between the date of the will and death and, consequently, the beneficiary named in the will had ceased to exist before the death. This case is distinguishable from *Re Kellner's Will Trusts*, [1949] 2 All E. R. 774, because in that case there was a gift to a teaching hospital, which kind of hospital receives special treatment under the 1946 Act, and it was held that nothing in the Act effected a dissolution of the corporation of the hospital and, hence, the gift was to the same person, although under the Act the gift, when paid, came to be applied under the Act. In *Re Morgan's Will Trusts* (*supra*) Roxburgh, J., held that the gift was to be applied for "the benefit of" the institution and was not a gift to any person. Hence, "the essential feature is the continuity of the activity", which had been carried on at the date of the will, and the learned Judge expressed the opinion that the bequest should be paid to the management committee, but apparently only upon the terms that it should be applied in the work carried on at the particular hospital. Standing alone this case is very limited in its preservation of gifts to hospitals made in wills executed before the Act came into force, but its ambit seems to have been much extended by the decision in *Re Frere* (*infra*), although in that case this particular point does not seem to have been taken.

There also seems to be another problem which has not received adequate discussion, namely, that in many cases owing to the extension of the hospital services new purposes other than the treatment of poor patients has been included. In our view the trend of the decisions is such that no notice will, in fact, be taken of this distinction.

Hospital—condition of defeasance—whether still a charity.—Two interesting points arose in *Re Frere*, [1950] 2 All E. R. 513, first, whether a defeasance clause attaching to a specific bequest should attach to a residuary gift to the same beneficiary and, secondly, whether hospitals taken over by the State remain charities. A subsidiary point was that a hospital retaining its identity as buildings but governed under a Group Hospital

Management Committee is to be treated as the same beneficiary as the hospital replaced by it. A testator had bequeathed a substantial legacy to a hospital by a will dated March 10, 1941, with a condition that it should still, at his death, be run on a voluntary scheme and not taken over by the State. After other gifts the residue was left to the hospital, no preliminary words of condition being inserted. Wynn-Parry, J., " with considerable reluctance " held that the condition attaching to the specific bequest did not apply to the residuary gift, so that the hospital took under the residuary gift. So to hold meant that the buildings controlled by a new body, the Group Hospital Management Committee, acting in respect of a group of hospitals, was sufficiently the same as the old body to receive the gift. In our opinion, this goes a little further than *Re Morgan's Will Trusts* (*supra*), because in that case the gift was " for the benefit " of the hospital, which seems more clearly to be associated with the activities going on in a building.

With regard to the second point, namely, whether a hospital falling within the Health scheme was still a charity, the learned Judge held that it was not open to him to decide otherwise, on the ground that he had in effect been precluded from doing so by the decisions in *Re Morgan's Will Trusts* (*supra*) and *Re Dean* (noted *ante*, p. 80). This looks as though the point will, in fact, go by default unless it is taken to the Court of Appeal, because it does not appear to have been argued, according to the reports of those cases.

It may also be convenient to note that in *Re Bland-Sutton*, [1950] 2 All E. R., at p. 473, Danckwerts, J., has held that a remainder over if the hospital were nationalised or passed into public ownership does not take effect in the case of a teaching hospital, because the effect of the 1946 Act on these hospitals is neither to nationalise them nor pass them into public ownership, although they may be administered by differently constituted authorities. It will be observed that this case appears to distinguish *Re Frere* (*supra*), where the hospital presumably was not a teaching hospital.

Fund to be applied at a future uncertain date—perpetuity—advancement of religion.—A testatrix directed to invest such sum in trustee securities as would be sufficient to train a candidate for the priesthood until such time as a candidate " came forward " from a particular church. This gift involved several questions : first, what was to be done with the income of

the fund until the candidate appeared, secondly, whether such a gift was charitable; and thirdly, whether it was valid having regard to the problem of perpetuity. In *Re Mander*, [1950] 2 All E. R. 191, Vaisey, J., held that as a matter of construction it must be assumed that the income should fall into residue pending the appearance of the candidate, that such a gift for a candidate was probably charitable as for the promotion of the Christian religion, but that it was void for perpetuity. The last decision in effect would naturally follow from the first. It is a well established rule that a contingent gift to a charity limited after a gift to a non-charitable purpose must take effect within the rule : cf. *Re Wightwick's Will Trusts*, [1950] 1 All E. R. 689 (noted *ante*, p. 180). No candidate from the named church might ever appear and so the limitation to the charity was contingent, and obviously if the contingency did happen it might do so beyond the perpetuity period. The defect in drafting in this clause obviously lies in the failure to direct that the income of the investment pending the appearance of the candidate should be devoted to charity. If this was done, of course the remoteness of the contingency would be immaterial, because this is one of the exceptions to the application of the Perpetuity Rule : *Re Tyler*, [1891] 3 Ch. 452.

It is to be observed that the learned Judge did not finally decide that a gift for the preparation of a candidate for ordination is a good charitable trust for the advancement of religion. Nevertheless, his Lordship was of opinion that it would constitute a charity and this seems consonant with earlier cases in which provision for the maintenance of priests has been held to be charitable. If they are not trained they can scarcely be maintained. It might also fall within the classification of charities for the advancement of religion.

Cy-près doctrine—unconditional gift—general charitable intention.—In *Re Good's Will Trusts*, [1950] 2 All E. R. 653, a testator left a sum to provide for land and buildings for Good's Rest Homes and a sum the income of which was to be applied for their maintenance. The scheme had, by the date of the testator's death, become impracticable. Wynn-Parry, J., held that the scheme was charitable, but that there was no general charitable intention and so the gift lapsed The learned Judge applied the *ratio decidendi* of *Re Wilson*, [1913] 1 Ch. 314, and *Re Packe*, [1918] 1 Ch. 437, that whether or not there was a general charitable intention depended upon the construction of the will as a whole. In *Re Wilson* (*supra*) the gift had contained a condition which could not

be fulfilled and might have been distinguishable upon that ground, but in *Re Packe* (*supra*) the gift had been for a Rest Home and had been disclaimed by the legatees on the ground that they could not carry out the intentions. Neville, J., in holding that the gift failed said that the will disclosed no other intention except the particular purpose stated in the will and so the gift failed.

It should be pointed out that where the matter is one purely of construction it must depend on the facts of each case. Furthermore, it must be borne in mind that the rule stated only applies where the money had never been applied to the charitable purpose.

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3. *PLANNING CASES*

Vendor and purchaser—duty to disclose.—One of the most important questions that arise in conveyancing is the duty to disclose and conflicting opinions are held on this point. So far as reported, authorities do not take us far, but each will require consideration.

In *Provincial Cinematograph Theatres, Ltd.* v. *Campbell*, 1 P. & C. R. 36 the contract required notice to be given to the purchaser of any notice received by the vendor " of any such intended requisitioning or compulsory purchase ". The Corporation gave notice to the vendor of a private bill which included compulsory powers of acquisition. The Court of Appeal overruling Danckwerts, J., held that notice of the bill was not notice of intended acquisition, but only of the intention to acquire compulsory powers of acquisition. This may seem a fine distinction, since the kind of clause involved in this decision is usually drawn in rather general terms, though the parties know that it is intended to cover matters widely that are difficult to cover with precision. There are now so many notices and similar possibilities under the various acts controlling land that it is desirable to formulate clearly what is anticipated.

Hawkwood Estate, Ltd. v. *Walker*, 1 P. & C. R. 30, turned upon a condition relating to planning permission to be obtained. The premises were in an area zoned for residential purposes, but they were, in fact, with the consent of the local authority, used for storage, maintenance of plant and manufacture of building materials. The contract stated that the purchasers had applied to the planning authority for consent to use for industrial purposes and contained a condition that the contract would be null and void if the application was refused. Hilbery, J., held that the

contract was avoided by refusal and specific performance was refused to the vendor. The vendor also claimed damages for failure to resubmit the application in a new form, but the learned Judge held that there was no evidence of a new bargain and, therefore, there was no claim.

In *Sidney* v. *Buddery*, 1 P. & C. R. 34, a very important issue was rather obscured by claims of fraud and misrepresentation. The vendor's bungalow was the subject of a very limited planning permission, but it was held that he represented to the purchaser that it would last her lifetime. Harman, J., held that the representation was fraudulent and that the purchaser could recover the purchase money.

But the learned Judge also said : " In my judgment where you find a piece of land with a house built upon it, you are entitled to assume that it was put up with proper leave. Not to tell a purchaser that a house is liable to be pulled down two years hence is to fail to disclose something which is material for the purchaser to know ". This goes very near to suggesting that any restriction on use due to planning control is material and must be disclosed. The decision certainly goes no further than the disclosure of conditions in limited planning permissions and does not deal with the use as such as a matter of title. Furthermore, the report is only a note of the decision and cannot be relied upon as a statement of general principle. This is clearly brought out by the note of *Mitchell* v. *Beacon Estates* (*Finsbury Park*), *Ltd.*, 1 P. & C. R. 32.

In *Mitchell* v. *Beacon Estates* (*supra*), the property was at the date of contract used as a car park, but it was, in fact, subject to a restriction to residential user, which restriction was registered in the Register of Planning Charges. The conveyance was completed in ignorance of the registered restriction. There was a claim for rescission with an alternative claim in fraud which was rejected on the facts. The claim for rescission was also rejected on the ground apparently that there was no misrepresentation sufficient to support an equitable claim in rescission. The note in the report does not contain any reference to the duty to disclose the permitted use or any discussion of the relevance of the fact that the restriction was registered and, therefore, could be discovered on search.

Neither of these cases can be regarded as assisting very far in determining the duties as between vendor and purchaser in the matter of " use ", but at least they are warnings of the need for caution.

In *Smith and Olley* v. *Townsend*, 1 P. & C. R. 28, another aspect of the problem arose. Here the precaution was taken

against limitations on the use by inserting in the contract the words " subject to answers to preliminary inquiries and subject to searches ". Roxburgh, J., held that the contract was either void for uncertainty or was subject to the answers to preliminary inquiries and searches being satisfactory to a reasonable man or woman. As the property was being purchased for industrial purposes and search showed that it was being zoned for residential purposes, the answers were unsatisfactory and the learned Judge held that they were entitled to recover their deposit on the ground that there was no enforceable contract. It is to be noted that this decision again does not carry us far, because from the vendor's point of view, and indeed, from a purchaser's point of view, it is not a satisfactory clause, since independently of the answers the contract might be held to be void for uncertainty in a condition precedent. The condition should specify more precisely what answers must be satisfactory.

" *Use* "—*definition*—" *light industrial purposes* "—*agricultural land.*—One of the most difficult problems that the Planning Acts will provide is the determination of the actual use. This is due to several causes. First, the variety of possibilities is so wide that no definitions can expect to cover them. Secondly, the absence of statutory definition is combined with many differences introduced by the Statutory Instruments, such as the Use Classes Order. Thirdly, the language of the Planning Legislation is reminiscent of other legislation, such as the Rating Acts. This is natural and, in some matters, there is a considerable body of case law. It will remain a problem to know how far these cases can be applied in planning questions. This is clearly brought out if the following cases are considered.

Crisp from the Fens v. *Rutland C. C.*, 1 P. & C. R. 48, turned upon the effect of words in a planning permission. The limitation was " the use of the building shall be limited to the manufacture of potato crisps or any use within Class III " (light industrial building) of the Use Classes Order. Potato crisps were manufactured in the building but the smell, noise and smoke caused an interference with amenity and the planning authority served an enforcement notice. The defendant pleaded that he was complying with the permission, while the authority contended that there was no compliance, if the use did not fall within the class of light industrial building, which the loss of amenity prevented. The Court of Appeal held that although the permission was ambiguous it must

be construed to mean that the manufacture of potato crisps was limited to such manufacture as would fall within the class of " light industrial building ". " Light industrial building " was by the Use Classes Order defined to include only buildings which were used without detriment to amenity. There would have been no ambiguity if the permit had been worded " or any *other* use ".

It was argued that the permission must be construed most strongly against the grantor on the same principle as a deed of grant. This argument was rejected by the Court on the ground that the planning authority was there to protect the public.

In *Butser Turf & Timber Co.* v. *Petersfield*, 1 P. & C. R. 65, the question arose on a rating assessment. The occupier claimed that the premises were agricultural land as " nursery grounds ". The turf was rolled and then mown and treated and finally the turf was cut and sold as turf. The Divisional Court (on appeal from Quarter Sessions), held that it could not be regarded as " nursery grounds ". " Old turf is being put into good condition by fertilising and weeding, but there is in no sense a rearing of young plants for the purpose of transplanting " : *per* Goddard, C.J., at p. 68. *James & Daniel Provan, Ltd.* v. *Croydon Corpn.*, (1938), 29 R. & I. T. 277 was distinguished on the ground that in that case there had been processes to turn low quality immature turf into turf of good quality. Consequently, the use of improving mature turf has no " nursery " quality, but if the turf is immature it is otherwise.

An even more striking case is *Meriden, etc., Assessment Committee* v. *Tyacke*, 1 P. & C. R. 89. Here a farmer had contracted to sell turf in order to get rid of it, because it was infested with parasites injurious to young cattle, though usable for fully grown cattle. Throughout the operation of cutting turf cattle were pastured on the field. The Divisional Court held that, although the land was used for agricultural purposes, it was not used for agricultural purposes only within the rating law and consequently was liable to be assessed, because " he was using it partly as pasture and partly as a source of supply of the turf which he had sold to somebody else " : *per* Goddard, C.J., at p. 93.

These decisions can pose some interesting problems of planning law, if they are to be followed. It is clear, apparently, that to use pasture for turf cutting is a change of " use " and if it is " material ", it will constitute " development " requiring planning permission unless it falls within permissions to be found in the various Statutory Instruments. In point of fact we do not think that such change of use is so covered. But they also illustrate another aspect of the problem, namely, that property can be subject to more than one use at the same time and presumably it is

possible for them both to be " permitted uses ". There does not seem to be any insuperable difficulty in law to the land enjoying the privilege concurrently of more than one use and indeed, the Act seems to contemplate this in connection with " Temporary Use ". It also becomes obvious that drafting contracts where there is a planning permission requires care. The permission may not be what it appears.

Appeal from enforcement notice—no right to case stated.—R. v. *Somerset Justices*, 1 P. & C. R. 60 is a serious decision for landowners. The cases we have just noted show adequately that whether or not a " use " is invalid is a matter of law and can be a very difficult matter of law. The Town and Country Planning Act, 1947, provides for appeal against an enforcement notice to a Court of Summary Jurisdiction. No doubt the object of making appeal lie to what is usually a lay tribunal was to make the appeal as inexpensive as possible—though we should have thought that the county court would have been at least as inexpensive. It may also have been the obvious association of this law with rating matters. In the case noted an appeal was made to Petty Sessions, who varied the notice, and appeal was then made to Quarter Sessions. Quarter Sessions dismissed the appeal in part and allowed the appeal in part but at the time no application to state a case was made. Three weeks later an application was refused on the ground of delay. A Divisional Court held that the Court could only grant a mandamus to compel the Justices to state a case where either the Criminal Justice Act, 1925, s. 20 (and this occurred only where a conviction was involved) or where the Justices had granted the application but failed to state the case. Consequently mandamus would not issue in the instant case. The validity of an enforcement notice does not involve a conviction and, therefore, the King's Bench Division cannot compel the Justices to state a case. This is to be regretted, though probably in practice the absence of compulsory powers will not affect the position very much. In our view it is to be regretted that these matters of law were not left essentially to professional Judges.

Compulsory acquisition—powers of Central Land Board.—Re Earl Fitzwilliam's Wentworth Estates Co. v. *Ministry of Town and Country Planning*, [1950] 2 All E. R. 765, may prove to be a most important case if it is upheld on general principles. The Estates Co. was unwilling to dispose of land at the existing use

value but in effect was claiming to receive the full use value with the planning permission but leaving the purchaser to carry also any development charge. The Central Land Board made a compulsory purchase order which was confirmed and this action was brought to quash the order. Birkett, J., refused the application to quash, but he said (at p. 777): "If the issue in this case had been one of this comparative simplicity, whether the powers conferred on the Central Land Board were powers which enabled them to exercise and to enforce a policy that land should not be sold at a price greater than its existing use value, I should have held that the Board had no such power". Nevertheless the learned Judge held that section 43 (1) included powers of compulsory purchase by the Board both for the purpose of collecting information concerning development values and for other purposes for resale for development. It was under the second head that the learned Judge held that the compulsory purchase order was authorised in this case.

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4. *WILL CASES*

By A. K. R. KIRALFY, Ph.D., LL.M., of Gray's Inn, Barrister-at-Law

Administration cum testamento annexo—immaturity of sole beneficiary no ground for denial of grant.—Re Taylor, [1950] 2 All E. R. 446. This case raises an important question of principle. The paternalism of the modern State stops short at protecting a property-owner from himself. There is no law to prevent a man earning a fortune and then squandering it. The law cannot use the accident that the fortune derives from an estate subjected to legal controls in the form of grants of probate or administration to produce a different result. In the instant case the sole beneficiary under a will, which created no protective trusts, insisted successfully on transfer of the estate under the Judicature Act, 1925, s. 162, and P. R. 119. Her own advisers supported an application to appoint someone else administrator. Willmer, J., held that the "special circumstances" referred to in the section as justifying another appointment had not been made out, and that the Court had no jurisdiction to interfere. The executors appointed in the will had all predeceased the testatrix. English law has found reasons for refusing to recognise the foreign status of "prodigals" (*Re Selot's Trusts,* [1902] 1 Ch. 488). The learned Judge in the present case pointed out the dangers of "the thin edge of the wedge" in this type of case.

Will—Perpetuity—No life in being—rule in Saunders v. *Vautier.*—*Re Jones*, [1950] 2 All E. R. 239; 66 T. L. R. (Pt. 2), p. 51. This case involved three interesting points. The bequest of perpetual annuities to a corporation was upheld and the annuitants were held entitled to demand the capital amount instead of the annuity, in such sum as would purchase enough 2½ per cent. Government stock to produce the amount of the annuity. These points seem to raise no new issues. The other point is rather more important. There was a special provision for redemption of the annuities by a capital payment out of the proceeds of sale of certain property. As no time was limited for such sale the special provision was held to be void for perpetuity. In fact it was probable that this sale would take place within two or three years but the law must look at possible events. Danckwerts, J., held "The realisation of his foreign estate might, or might not, take a very long time. It seems to me therefore that the gift of the capital sums is made on an uncertain event which cannot be said necessarily to be bound to happen within the period allowed by the rule against perpetuities". *Re Wood*, [1894] 3 Ch. 381, might have been cited as a very similar decision, but the learned Judge evidently considered the point too clear to require references.

(Theobald 350, 414.)

Will—Construction—Lapse by predecease of legatee cured by implication — referential bequests.—Re Hickman, Palmer v. *Playfair* (1950), 66 T. L. R. 1203; [1950] 2 All E. R. 285. A settlor had conferred a vested interest on his grandchild by a settlement and made a will leaving a further sum on the same trusts. Before he died his grandchild died without issue, so that this further gift would have lapsed under the ordinary law of wills and Wills Act, 1837, s. 33. Did the bequest part company from the interest under the settlement? Danckwerts, J., was able to hold that it did not. He found an intention that it should follow the same fate as the interest under the settlement. He distinguished a number of cases in which lapse had been held to have occurred on the rather mechanical principle of incorporation of the trusts of the settlement by reference into the will so as to produce an independent gift to the dead grandchild. The learned Judge pointed out that the effect of finding lapse in the previous decisions had been reasonable, which was not arguable in this case. Hence the testator's son-in-law, the child's father, who had taken his vested interest as next of

kin on the child's intestacy, also took the added sum as an accretion to that estate.

(Theobald 511, 555.)

Will — Construction — Occupation clause — Uncertainty.—Re Field's Will Trusts, [1950] 2 All E. R. 188, 66 T. L. R. 1221. A gift over to a beneficiary " if he shall occupy " a certain house was held void for uncertainty, so that the previous gift became absolute. *Sifton* v. *Sifton*, [1938] A. C. 656, was applied. The practical consequences were not grave.

(Theobald 431.)

Will—Construction—Intestacy—Spouse's rights.—Re Chaplin, [1950] 2 All E. R. 155, is instructive on the meaning of the " personal chattels " which are taken by a surviving spouse absolutely on intestacy (A. E. A., 1925, ss. 46 (1) (i), and 55 (1) (x)) and probably on the same phrase in a will. A motor yacht used for pleasure was held to pass. " Personal " is interpreted as distinguished from commercial objects. It is wider than articles of personal use in the popular sense. *Re White*, [1916] 1 Ch. 172, in which a private motor car passed, was followed.

(Theobald 157.)

Will—Forfeiture Clause—Lunacy.—Re Oppenheim's Will Trust, [1950] 2 All E. R. 86; 66 T. L. R. 1040. Here there was a forfeiture clause if a legatee ceased to be able to give a personal discharge. He was certified and a receiver in lunacy appointed. It was held that the receiver was a statutory agent for the lunatic and the lunatic was therefore capable of giving a discharge. For a legatee to lose his income on such an event would really frustrate the intentions of the settlor, and the receiver would no doubt be careful to see that the lunatic received the maximum benefit. *Re Marshall*, [1920] 1 Ch. 284, was applied

(Theobald 444.)

Will—Perpetuity—Dependent Limitations.—Re Mill, [1950] 2 All E. R. 292, is an affirmation by the Court of Appeal of the decision of Romer, J., referred to in the previous issue, and based on the same reasoning, turning mainly on questions of construction.

(Theobald 416.)

Will—Construction of Devise as Residuary.—Re Ridley, [1950] 2 All E. R. 1, as now reported throws a little more light on the point referred to in 14 Conveyancer 183. Harman, J., has specifically adverted to the problem whether devises are still in principle specific, but decided the case as a matter of construction, holding that the devise of lands was not intended by the testator to be a residuary devise. Academic writers have criticised the idea of the survival of the old rule that " all devises are specific ". So far the cases have not directly raised the issue.

(Theobald 585.)

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5. *FAMILY LAW CASES*

By C. E. P. Davies, M.A., B.C.L., of the Inner Temple, Barrister-at-Law

Divorce—connivance—steps taken to obtain evidence of adultery—connivance must relate to inception of adulterous conduct.—In *Mudge* v. *Mudge and Honeysett*, [1950] P. 173, a husband separated from his wife, having heard that she was living in adultery with the co-respondent, watched with some detectives outside her house one night and saw adultery being committed. The wife in her answer pleaded that her husband had connived at the adultery by watching her on the night in question and failing to do anything to prevent adultery occurring. Hodson, J., however, decided that these circumstances did not amount to connivance because the husband had no corrupt intention of promoting or encouraging the adultery. Passive acquiescence, he said, was not alone sufficient to constitute connivance, though if practised for the purpose of " lulling (the wife) into a sense of security " in order that she should commit adultery it might be. In *Douglas* v. *Douglas*, [1950] 2 All E. R. 748, however, the husband petitioner had deliberately absented himself from the

home where he and his wife lived together on the occasion when conclusive evidence of adultery was obtained by private inquiry agents whom he had employed and the Divorce Commissioner had held that this showed a corrupt intention of promoting or encouraging the adultery and amounted to connivance. But the decision was reversed on appeal, the Court applying the principle of *Churchman* v. *Churchman*, [1945] P. 44, that connivance must, in general, either relate to the inception of adulterous conduct and not to its repetition, or, if connected with its repetition, must show that the party had connived at it from the first. In the present case the husband had suspected adultery between his wife and the co-respondent for some time and had indeed on a previous occasion obtained some evidence of it, though not sufficient to satisfy the burden of proof required by s. 178 (2) of the Judicature Act, 1925, as amended by the Matrimonial Causes Act, 1937, s. 4.

(Latey, p. 113, Supplement.)

Divorce—cruelty—absence of intention to injure.—" If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage is imperilled." With these words Denning, L.J., concluded his judgment in *Kaslefsky* v. *Kaslefsky*, [1950] 2 All E. R. 398, at p. 403, an appeal from the decision of a Divorce Commissioner dismissing a husband's petition for divorce on the ground of his wife's cruelty. The cruelty alleged was that the wife had written to her husband while he was serving overseas during the war asking for her freedom, and saying that she did not wish to keep their child any longer but wanted him to be adopted; that on her husband's return to England she had refused to have sexual intercourse with him; that she showed a complete disregard of her wifely duties, neglecting to prepare meals for her husband and staying in bed in the mornings while her husband went to work; and that she had failed to look after their son, leaving him to be cared for by her husband and mother. No intention on the part of the wife to injure her husband could be proved, her conduct being merely, in the words of the Commissioner, " sluttish "; nor could it be clearly shown that he had suffered in health by her conduct. In *Squire* v. *Squire*, [1949] P. 51, it had been decided by the Court of Appeal that, in the

particular circumstances of that case, where an invalid wife had made excessive demands upon her husband, which included requiring him to read to her through the night and otherwise preventing him from sleeping, the absence of intention to injure him did not prevent her conduct from amounting to cruelty, but Evershed, L.J., said (at p. 60) "I do not say that proof of such an intention may not be an important, or in some cases even an essential, consideration, but in the circumstances of the present case . . . I do not think that proof of such an intention was requisite for the husband's success". He did not, however, describe the cases where proof of such an intention was necessary, and this was done by Denning, L.J., in *Kaslefsky* v. *Kaslefsky*, at p. 402. On the one hand, he said, there need be no intention to injure where the conduct alleged to constitute cruelty consists of direct action by the one party to the marriage against the other, such as a display of temperament, emotion or perversion, or even sulkiness or nagging, provided that the acts can be distinctly proved to have caused injury to health; but on the other hand intention to injure must be shown where the conduct complained of does not consist of direct action, but only of misconduct indirectly affecting the other party, such as drunkenness, gambling or crime. Accordingly, as the wife's conduct in the present case did not constitute direct action against her husband, and she had no intention to injure him, the appeal was dismissed.

(Latey, p. 73, Tolstoy, p. 52.)

Divorce—cruelty—insanity of respondent.—In *White* v. *White*, [1950] P. 39 (noted in *The Conveyancer*, Vol. 13, p. 477, December, 1949) the question whether insanity of the respondent constituted a good defence to a petition for divorce on the ground of cruelty was left open by the majority of the Court of Appeal (Bucknill and Asquith, L.JJ.), though Denning, L.J., adopting for this purpose the remedial in preference to the penal theory of divorce, expressed the opinion that, by analogy to contract and tort cases, insanity of the respondent would not be a defence unless the petitioner knew of it. In *Lissack* v. *Lissack*, [1950] 2 All E. R. 233, this issue was again raised. The wife petitioned for divorce on the ground of her husband's cruelty, consisting of the murder of their only child. The husband had been tried for murder and found guilty but insane and was in Broadmoor when the petition was presented. By his guardian *ad litem* he pleaded as a defence that he was at the material times not responsible for

his actions owing to disease of the mind. Pearce, J., applying the reasoning of Denning, L.J., in *White* v. *White*, held that this was no defence, and gave the wife her decree. He also said that, if insanity were a good defence, the test propounded by the Judges in the case of *M'Naghten* was not very satisfactory for measuring misdeeds so dependent on the circumstances and personalities of the parties as acts of cruelty, in matrimonial cases, and that the criterion applied in common law and Chancery Courts would be more practical: "Was the person alleged to be of unsound mind at the date in question capable of understanding the nature of the act he was performing".

(Latey, p. 76.)

Divorce—cruelty—standard of proof.—In *Bater* v. *Bater*, [1950] 2 All E. R. 458, the Court of Appeal considered once more the question of the standard of proof in divorce cases, which had previously been discussed in *Davis* v. *Davis*, [1950] P. 125 (*The Conveyancer*, Vol 14, p. 78, March 1950) and *Gower* v. *Gower*, [1950] 1 All E. R. 804 (*The Conveyancer*, Vol. 14, p. 189, June, 1950). The Divorce Commissioner had dismissed a wife's petition for divorce on the ground of her husband's cruelty because she had not proved the charges of cruelty "beyond reasonable doubt". An appeal on the ground that the Commissioner had thereby insisted upon the "criminal" standard of proof, contrary to *Davis* v. *Davis*, was dismissed, the Court of Appeal pointing out that section 178 (2) of the Judicature Act, 1925 (as amended by the Matrimonial Causes Act, 1937, s. 4) required the Court to be "satisfied on the evidence that the case for the petition has been proved" and that the Court could not be satisfied if left in reasonable doubt. Thus there may be at least three separate standards of proof; the "beyond all reasonable doubt" standard in criminal cases; the "satisfied on the evidence" standard in divorce cases; and the "balance of probabilities" standard in civil cases. But, as Denning, L.J., pointed out, the difference may be more a matter of words than anything else, for there is no absolute standard in either criminal or civil cases and the degree of proof required varies to some extent with the nature of the case.

(Latey, p. 69, Supplement.)

Divorce—cruelty—condonation and revival—conditional forgiveness becoming absolute by lapse of time.—In *Beale* v. *Beale*, [1950] 2 All E. R. 539, husband and wife cross petitioned for divorce on the ground of cruelty. Each relied on acts of cruelty alleged to have occurred between 1930 and 1938. From 1938 until 1945 the parties lived a normal married life, but after 1945 there were further acts of alleged cruelty. The Divorce Commissioner dismissed both petitions, and both parties appealed. The Court of Appeal considered that the events of 1945 onwards did not amount to cruelty by either party; nor did they revive the earlier acts of cruelty alleged to have been committed between 1930 and 1938 because these had been condoned. Condonation was conditional forgiveness and the guilty party was " taken back on probation ", but the probationary period did not necessarily last for life and the time might come when conditional forgiveness became absolute.

(Latey, p. 126.)

Divorce—desertion—respondent voluntary patient in mental hospital.—*More* v. *More*, [1950] P. 168, was a wife's petition for divorce on the ground of her husband's desertion. The marriage took place early in 1938. Towards the end of the that year the husband developed mental illness, which resulted in his making two assaults upon his wife, and then entered a mental hospital as a voluntary patient, where he remained until after the petition was filed on March 31, 1949, but he was not at that date certifiable as a person of unsound mind. During that time he knew that he had a wife and that it was a man's duty to live with his wife, but was content to remain in the mental hospital though he could have left at any time. He was, in fact, indifferent to living with her and when she made the suggestion he evaded the issue and changed the subject. The Court (Pilcher, J.,) accordingly held on these facts that the husband had the *animus deserendi* during the whole of the three years immediately preceding presentation of the petition and granted the decree.

(Latey, p. 110.)

Marriage contracted in Soviet Union—husband domiciled in England and wife domiciled in the Union—whether invalid for failure to comply with Soviet form.—*Kenward* v. *Kenward*, as

briefly reported in *The Times* newspaper, June 9, 1950, was noted in the last number of *The Conveyancer* (Vol. 14, p. 197, June, 1950); a fuller report is now available in [1950] 2 All E. R. 297. The grounds upon which the majority of the Court of Appeal, reversing the decision of Hodson, J., held that this marriage between a British sailor domiciled in England and a Russian girl domiciled in the U.S.S.R. solemnised in Russia before a Russian official was void were that some of the formalities required for a valid marriage in Russia had been deliberately omitted in order to prevent the ceremony from constituting a marriage. Denning, L.J., however, while agreeing that the marriage lacked some essential formalities, preferred to rest his opinion upon a different ground, and held that the marriage was invalid for failure of the essential condition that the parties should be allowed to live together. The English law of marriage, he said, was familiar with conditions making a marriage voidable, whether existing at the time of the marriage, as when a husband had venereal disease of which he has not told his wife, or when a wife was pregnant by another man which she had not disclosed to her husband; or arising subsequently, as where one of the parties wilfully refused to consummate the marriage, or turned out to be impotent. When persons domiciled in different countries marry, the personal law of one of the parties may attach a fundamental condition to the marriage which does not exist in the personal law of the other, and if they marry on the basis that that fundamental condition will apply, the marriage may be avoided if the condition is unfulfilled.

(Latey, p. 33.)

Nullity—petition by husband on ground of his own impotence—whether corroboration required.—Hodgkins v. *Hodgkins*, [1950] P. 183 was an unusual case of a petition by a husband for a decree of nullity on the ground of his own impotence Evidence at the hearing consisted mainly of the petitioners' own testimony and the petition was dismissed for reasons which are far from clear. The judgment of the Court of Appeal allowing the appeal and ordering a rehearing before another Judge dealt mainly with the question of corroboration. This, being a petition for a decree of nullity on the ground of impotence, was a case in which the Ecclesiastical Courts would have exercised jurisdiction before 1857. The effect of the Matrimonial Causes Act, 1857, s. 22, as amended by the Judicature Act, 1925, s. 32, is that in such cases the procedure and practice of the Ecclesiastical Courts shall be followed, and Canon 105 of 1603

provides that " credit shall not be given to the sole confession of the parties themselves ". But the Court of Appeal said that it did not appear that this rule of the Canon Law had ever been made part of the law of England and quoted the opinion of Lord Penzance, J.O., in *U.* v. *J.* (1867), L. R. 1 P. & M. 460 that it was within the province of the Court, if the last trace of reasonable doubt as to the truth and *bona fides* of the case had been removed, to pronounce a marriage invalid on the unsupported oath of the petitioner. Accordingly the Court said that corroboration was not essential in law, though required in practice unless its absence could be satisfactorily accounted for, but that without it the Judge must exercise even greater care than he normally does to make sure that the case is proved before granting the relief which is prayed.

Divorce—application to Divisional Court for rehearing on ground that fresh evidence available—Matrimonial Causes Rules, 1947, *r.* 36.—The Courts have often had occasion to consider the distinction between appeal to the Court of Appeal in matrimonial cases under the Judicature Act, 1925, ss. 27 (1) and 31 (1) (e), and the right given by rule 36 of the Matrimonial Causes Rules, 1947, to apply to the Divisional Court for a rehearing, and the question arose again for decision in *Prince* v. *Prince*, [1950] 2 All E. R. 375. Rule 36 provides that " an application for rehearing of a cause heard by a judge alone *where no error of the court at the hearing is alleged* shall be made to a Divisional Court of the Probate Division ". The rule expresses the whole residue of appeal jurisdiction left to the Probate Division after a considerable body of matters of appeal had been transferred to the Court of Appeal, and it serves the useful purpose of reducing in the public interest the danger of miscarriage of justice and also of ensuring that there shall be a trial of the real issue between the parties before a case comes before the Court of Appeal. But as the rule gives some appellate jurisdiction to the Divisional Court of the Probate Division there may be a risk of trenching upon the jurisdiction of the Court of Appeal, and, therefore, the Divisional Court will only exercise its power in cases where it is clear that it was intended to have jurisdiction to the exclusion of the Court of Appeal, and the words in italics, whatever may be their historical antecedents, were added in 1924 to impose a limitation upon the Divisional Court's jurisdiction by depriving that Court of what Langton, J., described in *Manners* v. *Manners*, [1936] P. 117, as the " power either to meditate mournfully upon our own errors, or perhaps

more pleasurably upon each other's errors" (p. 127). It is, however, by no means clear what defects in earlier proceedings may properly be regarded as errors of the Court, and the Courts have, perhaps wisely, declined to commit themselves to any formal definition. A clear instance in which the Divisional Court exercised jurisdiction was *Manners* v. *Manners*, [1936] P. 117, where a cause was reheard on the ground that the respondent was not properly served with the petition; in *Winter* v. *Winter*, [1942] P. 151, a suit for dissolution instituted by a wife on account of her husband's desertion was ordered to be reheard on the application of the husband (who had not entered an appearance at the hearing) on the ground that the decree granted to the wife was against the justice of the case in that it was untrue that he had deserted her and that he now wished to place the full facts before the Court; and in *Peek* v. *Peek*, [1948] P. 46, the Divisional Court ordered rehearing of a petition for divorce brought by a husband against his wife for desertion on the ground that evidence on material points affecting both the issue of desertion and the exercise of discretion in the petitioner's favour had been suppressed by the petitioner at the trial and had only subsequently come to light. But in *Petty* v. *Petty*, [1943] P. 101, the Divisional Court refused to order a rehearing where in a defended case the Judge, after hearing all the available evidence, had preferred to believe the husband and his witnesses rather than the witnesses on the other side. Fresh evidence was available, but the Divisional Court considered this to be a clear case where error of the Court at the hearing was alleged. In *Prince* v. *Prince*, [1950] 2 All E. R. 375, a husband, whose petition for divorce on the ground of his wife's adultery had been dismissed for insufficient evidence, applied to the Divisional Court for a rehearing on the ground that fresh evidence had since become available. The Divisional Court dismissed the application and the husband appealed. In the Divisional Court Lord Merriman, P., had considered the case identical with *Petty* v. *Petty*, but an attempt was made to bring it within the principle of *Peek* v. *Peek*, by contending that there the Divisional Court had ordered a rehearing because material evidence had been suppressed by the petitioner and that in the present case also material evidence had been suppressed, though by the respondent. But the Court of Appeal, after reviewing all the earlier cases, dismissed the appeal on the ground that the matters raised were appropriate for consideration upon an appeal to the Court of Appeal, when the Court could have heard the fresh evidence, and were, therefore, outside the jurisdiction of the Divisional Court upon an application under rule 36. The Court

also expressed the view that, having regard to the difficulties encountered in interpreting rule 36, consideration should be given to the drafting of a new rule which would express more precisely the scope and limitation of the jurisdiction which the Divisional Court was intended to exercise.

(Latey, p. 309; Tolstoy, p. 271.)

Divorce—service of petition dispensed with—Matrimonial Causes Act, 1857, *s.* 42.—In *Luccioni* v. *Luccioni*, [1943] P. 49, Lord Merriman, P., dealing with section 42 of the Matrimonial Causes Act, 1857, which enables the Court to dispense with service of a petition in any case where it shall seem necessary or expedient so to do, said (p. 51): "In the case of petitions which involve a change of status, and where any form of substituted service is impossible, the Court, before dispensing with service, should require to be satisfied that the respondent spouse has become aware of the fact that the petition is being prosecuted, or, at the very least, of the intention to prosecute it, and, in either case, has had time and opportunity to indicate whether he or she desires to defend". It was pointed out on appeal from this decision, however, that the circumstances mentioned by the President, though proper to be taken into consideration, were not exhaustive. But in *Weighman* v. *Weighman*, [1947] 2 All E. R. 852, considerable weight was given by the Court of Appeal, when allowing an appeal from an order of Finnemore, J., on a wife's application refusing to dispense with service of a petition for dissolution of the marriage on the ground of her husband's desertion, to a letter written by the husband which showed that he knew there was at least a likelihood of proceedings. In *Paolantonio* v. *Paolantonio*, [1950] 2 All E. R. 404, however, the Court of Appeal again affirmed the principle that knowledge by the respondent of pending or contemplated proceedings was not essential, and allowed service to be dispensed with of a wife's petition for dissolution of her marriage on the ground of her husband's desertion where the husband, domiciled in the United States, had left his wife in England in September, 1945, and had returned to America and had written her three letters in December, 1945, saying he did not intend to live with her again; and the wife, having served divorce papers on her husband by registered post at his last known address in the United States, had had the documents returned by his mother with a covering letter saying that her son had left for Europe and had not been heard of for some time.

(Latey, p. 603.)

Divorce—maintenance—whether amount payable by husband must be reduced on account of wife's earning capacity.—In *Rose* v. *Rose*, [1950] 2 All E. R. 311, the Court of Appeal declined to formulate any general rule to determine whether the sum payable by a husband on account of maintenance must be reduced on account of the wife's earning capacity, but said that in general where a wife had not during the subsistence of the marriage been required to earn any money, and had young children to look after, her potential earning capacity should not be taken into account to reduce the maintenance payable by her husband. But Denning, L.J., indicated that her existing, or potential, earning capacity should be taken into consideration (1) if she does in fact earn, (2) if she is a young woman with no children and obviously ought to go out to work in her own interest, and (3) if she has worked regularly during her married life and might reasonably be expected to work after the divorce.

(Latey, pp. 193, 207.)

Divorce—decree nisi—application by petitioner for decree to be rescinded and judicial separation substituted—cross application by respondent for decree to be made absolute—Judicature Act, 1925, s. 183 (3) *and Matrimonial Causes Act*, 1937, *s.* 9.—In *Jeffrey* v. *Jeffrey*, [1950] 2 All E. R. 449, a wife had in 1949 obtained a decree nisi of divorce against her husband on the ground of adultery. Unsuccessful negotiations for maintenance followed and the wife now applied to have the decree rescinded and a decree of judicial separation substituted; there was a cross-application by the husband for the decree nisi of divorce to be made absolute. Though the wife alleged that she had brought the petition for divorce against her conscience and had now reverted to her original opinion that it was wrong to dissolve a marriage, the Court, considering that her dominant motive was financial, exercised its discretion to refuse her application and made the decree nisi of divorce absolute.

(Latey, p. 504.)

Divorce—privileged communication—probation officer consulted by one party—whether correspondence between probation officer and other party privileged.—In *McTaggart* v. *McTaggart*, [1949] P. 94 (*The Conveyancer*, Vol. 14, p. 82, March, 1950), the view was

expressed obiter by the Court of Appeal that a probation officer would be privileged from disclosing what was said by an estranged husband and wife during an interview at which he was present arranged with a view to effecting reconciliation. In that case the mediation of the probation officer was accepted by both parties. But in *Mole* v. *Mole*, [1950] 2 All E. R. 328, the principle was extended by the Court of Appeal to a case where the probation officer had been consulted with a view to reconciliation by the wife only but had had some correspondence with the husband. Denning, L.J., also said that he did not accept the correctness of *Bostock* v. *Bostock*, [1950] 1 All E. R. 25 (*The Conveyancer*, Vol. 14, p. 83, March, 1950) in which Omerod, J., refused to apply this principle to communications for the purpose of effecting reconciliation between husband, wife and their solicitors.

(Tolstoy, p. 284.)

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6. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Rent Restrictions Acts—Landlord and Tenant (Rent Control) Act, 1949—*premium paid and agreement executed between March 25 and June 2*, 1949—*premium recoverable by tenant—landlord not entitled to avoid lease.*—The decision of the Court of Appeal in *Haberman* v. *Westminster Permanent Building Society*, [1950] 2 All E. R. 16, settles a point upon which there had been some doubt in regard to the construction of the 1949 Act. The decision is certainly in accordance with the literal construction, but the result is perhaps a little anomalous. Briefly, the case decided that the proviso to section 2 (5) of the Act, which enables an agreement made between March 25 and June 2 to be avoided in certain circumstances, only applies where a premium has not in fact been paid. The 1949 Act was passed and came into force on June 2, 1949, but its operation was made retrospective so as to enable premiums to be recovered if they had been paid under agreements made after March 25, provided that such premiums could not lawfully have been required if the Act had been in force. To this a proviso was added in the following terms :—

> " Provided that where an agreement has been made since the said 25th March and before the commencement of this Act, and the agreement includes provision for the payment of a premium which could lawfully be required under the

enactments hereby repealed but which, if paid in pursuance of the agreement, would be recoverable, wholly or in part, by virtue of the foregoing provisions of this subsection, the agreement shall, without prejudice to the operation of this section, be voidable at the option of either party thereto."

The facts of *Haberman's Case* were that an agreement for the lease of a flat for fourteen years was made on March 30, 1949, and it included provision for the payment of a premium of £400. The premium was paid, a formal lease was executed, and the tenant took possession, before June 2. Later the tenant claimed the recovery of the premium, and the landlord counterclaimed for the avoidance of the lease under the proviso to section 2 (5).

It might be thought that the proviso was intended to create a *locus pœnitentiæ*, so as to give, *inter alia*, the person to whom a premium *was paid or was to be paid* a power to put an end to an agreement of which (owing to the provision for the recovery of such premiums) part of the consideration had failed. The Court of Appeal rejected this view. They pointed out that the words "if paid . . . would be recoverable" implied that the premium had not actually been paid; the opposite construction involved writing into the proviso words which were not there. The Court were also influenced by the consideration that, if the proviso were held to extend beyond executory agreements, there was nothing in the Act to provide for any limit to the time within which the option to avoid the agreement could be exercised.

It is difficult to quarrel with this decision, but it is somewhat arbitrary that the landlord's power to avoid the agreement should depend upon the accident of whether the premium has actually been paid or not.

(Rent Restrictions Guide, 3rd ed., p. 76.)

Rent Restrictions Acts—Landlord and Tenant (Rent Control) Act, 1949—jurisdiction of Tribunals—not sufficient that it appears to Tribunal that a premium has been paid—premium must actually have been paid—meaning of premium.—In two recent cases, decided on applications for orders of *certiorari*, the Court has defined the jurisdiction of Rent Tribunals under the Landlord and Tenant (Rent Control) Act, 1949. The more important case is *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex p. Philippe*, [1950] 2 All E. R. 211. In that case the Tribunal had treated two sums as premiums, although one of them was a payment in respect of work of reconstruction and decoration carried out by

the landlord and thus not a premium within the meaning of the Act, and had determined the rental equivalent of the combined amount. The Court quashed this determination, but held that the certificate of the Tribunal that Part I of the First Schedule to the Act applied was valid, as one of the sums paid was in fact a premium. Two main points should be noted : (a) the Tribunal's jurisdiction to determine the rental equivalent of a premium, although ancillary to their jurisdiction to determine the standard rent, was separate therefrom, and an erroneous exercise of it could be quashed on *certiorari*; (b) despite the wording of para. 1 of Part I of the First Schedule, the Tribunal had no jurisdiction to determine the rental equivalent of a premium unless a premium had been paid, and it was not sufficient that it " appeared to the Tribunal " that it had been paid. The Tribunal's jurisdiction was not of the ampler kind mentioned by Lord Esher, M.R., in *R.* v. *Income Tax Special Purposes Commrs.* (1888), 21 Q. B. D. 313, 319, " which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more ".

In *R.* v. *Barnet, etc., Rent Tribunal, ex p. Millman*, [1950] 2 All E. R. 216, the payment in question was made by the tenant to the landlord for the genuine purchase of the goodwill of the landlord's business of a retail confectioner and tobacconist, which the tenant took over when he became the lessee of the combined dwelling-house and shop in which the business had been carried on. Although payments for goodwill are expressly dealt with in the 1949 Act, in connection with the assignment of tenancies or the grant of furnished tenancies (section 2 (4) and section 12 (2)), they are not so dealt with in connection with the grant of unfurnished tenancies. The Court, however, held that even if the payment for the goodwill could be regarded as a " premium " (which was not decided) it was not paid " in respect of " the grant of the tenancy. The Court, therefore, quashed the Rent Tribunal's certificate that Part I of the First Schedule to the 1949 Act applied, and their determination of the rental equivalent.

It may be noted here that applications for certificates under Part I of the First Schedule ceased to be possible on June 2, 1950.

(Rent Restrictions Guide, 3rd ed., pp. 73–76.)

Rent control—Landlord and Tenant (Rent Control) Act, 1949—Rent Tribunal—no power to rectify written tenancy agreement.—In *R.* v. *Hackney, Islington and Stoke Newington Rent*

Tribunal, ex p. Keats, [1950] 2 All E. R. 138, the Divisional Court quashed on *certiorari* the order of a Rent Tribunal under the Landlord and Tenant (Rent Control) Act, 1949. The Tribunal had purported to determine a reasonable rent in respect of premises which had been let for business purposes. As the 1949 Act relates to dwelling-houses only, this appeared clearly to be *ultra vires*, but the Tribunal had justified its action by stating that they had formed the view that the purported letting for business purposes was a sham. The Divisional Court had some strong things to say about this " dangerous usurpation of power ", and pointed out that the Tribunal had no jurisdiction to rectify written agreements. Unless and until the agreement had been rectified by a Court which had jurisdiction to do so, the Tribunal had no power to entertain the application. A similar point was discussed under the Furnished Houses (Rent Control) Act, 1946, in *R.* v. *Paddington and St. Marylebone Rent Tribunal, ex p. Bedrock Investments, Ltd.*, [1947] K. B. 984, at pp. 990, 992.

(Rent Restrictions Guide, 3rd ed., p. 66.)

Rent Restrictions Acts—contracting out—prevention of Acts from applying—surrender of tenancy and grant of licence.—*Foster* v. *Robinson*, [1950] 2 All E. R. 342, illustrates the proposition that, although it is impossible to contract out of the Rent Restrictions Acts by a provision in a tenancy or otherwise, there is nothing to prevent the parties from so arranging matters that there is nothing to which the Acts apply, provided that the transaction in question is genuine and not a sham. The tenant of a farm cottage had been for many years in the employment of his landlord, a farmer. When the tenant became too old to work a verbal arrangement was made between him and the landlord that he should pay no further rent but should continue to reside in the cottage rent free. Thereafter there was no demand for or tender of rent. The County Court Judge found that the effect of this arrangement was that the contractual tenancy came to an end and the erstwhile tenant became a licensee. When he died, therefore, there was no tenancy to vest in his administratrix, and the owner of the cottage was entitled to possession. The Court of Appeal upheld this decision. The agreement found by the County Court Judge effected a surrender by operation of law of the tenancy, and, despite the absence of any formal instrument, the owner was estopped from asserting that the tenancy continued to subsist. The Court of Appeal emphasised that their decision

turned on a question of fact, and that there was evidence to support the County Court Judge's finding of fact that the transaction here was a genuine transaction and not a sham.

(Rent Restrictions Guide, 3rd ed., p. 15.)

Rent Restrictions Acts—combined shop and dwelling-house—cesser of occupation of residential part—expiration of lease—subsequent re-occupation of residential part—tenant not protected.—In *John M. Brown, Ltd.* v. *Bestwick*, [1950] 2 All E. R. 338, a combined shop and dwelling-house within the Rent Restrictions Acts was let to a tenant for a fixed term. Before the end of the term he ceased to occupy the residential part and sub-let it, so that he only occupied the business part at the end of the term. Some months later the landlord gave notice to quit, and the sub-tenant vacated the residential part, but the tenant instead of delivering up possession of the premises resumed occupation of the residential part. He then claimed that he was a statutory tenant. The Court of Appeal held that, as the tenant had ceased to occupy the residential portion of the premises at the time the contractual tenancy expired, he acquired no statutory tenancy of the premises. At the material date, the expiration of the contractual tenancy, he was using the premises for business purposes only, and was thus outside the Acts. The fact that by the time proceedings were commenced he had resumed occupation of the residential part was immaterial. Although, in accordance with *Prout* v. *Hunter*, [1924] 2 K. B. 736, the date of the issue of the plaint is the material time in determining whether or not a dwelling-house is one to which the Acts apply, it does not follow that this is the material date for determining whether or not a statutory tenancy has been acquired. It is clear that a different decision would have been equivalent to extending the Act to the protection of purely business premises.

(Rent Restrictions Guide, 3rd ed., p. 25.)

Rent Restrictions Acts—apportionment of standard rent—larger unit outside Acts by reason of its rateable value—new control—apportionment "necessary".—The chief interest of *Capital and Provincial Property Trust, Ltd.* v. *Rice*, [1950] 2 All E. R. 174, lies in the dissenting judgment of Denning, L.J. The case was one in which at the relevant date (September 1, 1939, as it was a "new control" case) a flat, the rateable value of which was within the

Acts, was let together with another flat as one dwelling. The composite dwelling was outside the Acts by reason of its total rateable value. The question was whether the standard rent of the flat in question, when it came to be let as a separate dwelling, was to be determined by apportionment of the rent of the composite premises. The majority of the Court of Appeal (Bucknill, L.J., and Hodson, J.) held that section 12 (3) of the 1920 Act, as applied in *Upsons, Ltd.* v. *Herne*, [1946] K. B. 591, required an apportionment. Denning, L.J., disagreed. He distinguished *Upson's, Ltd.* v. *Herne* as a case of old control. His explanation was that under old control the application of the Acts depended not only on the rateable value but also the rent, and hence it might be "necessary" to apportion rent in order to decide whether a house came within the Acts. Under new control this is not so. Section 5 of the 1938 Act suggests that where the whole unit is outside the Acts the rent is not determined by apportionment. The rule is, therefore, according to Denning, L.J., that the standard rent of a dwelling-house is not determined by apportionment unless the larger unit in which it is comprised is itself a controlled dwelling-house with a standard rent which can be apportioned.

There is a lot to be said in principle for Denning, L.J.'s view, but it is doubtful whether he does justice to the *rationes decidendi* of the authorities which he distinguishes. In particular he does not seem to be correct in saying that the application in *Lindop* v. *Quaife*, [1949] 1 All E. R. 456, was to apportion rateable value, not rent. The method of arriving at the apportionment of rent in that case was by apportioning the rateable value and applying the proportions so obtained to the rent. The decision was, however, definitely a decision as to apportionment of rent. The larger unit there was outside the Acts, and the case was one of new control. It is, therefore, a decision directly in conflict with Denning, L.J.'s view, and not, as he suggests, distinguishable.

(Rent Restrictions Guide, 3rd ed., p. 50.)

Rent Restrictions Acts—attornment clause in mortgage—creation of landlord and tenant relationship—rent more than two-thirds of rateable value—application of Acts.—In *Portman Building Society* v. *Young*, [1950] 2 All E. R. 443, Danckwerts, J., held that an attornment clause in a mortgage deed created the relationship of landlord and tenant between the mortgagee and mortgagor of a dwelling-house, and that, the house being within the Rent Restrictions Acts, the mortgagor was entitled to the

protection of the Acts. The rent payable under the attornment clause was not, it should be noted, a nominal rent, but a rent equal to the amount of the monthly instalments payable under the mortgage. If the rent had been nominal the tenancy thus created would have been excluded from the Acts by section 12 (7) of the 1920 Act.

Danckwerts, J., observed that in view of the amendment of Order 3, r. 6 of the R. S. C., he found it difficult to see the point of the attornment clause. Formerly such a clause enabled a specially endorsed writ to be issued under Order 3, r. 6, and proceedings to be taken for summary possession. Draftsmen will no doubt consider whether such clauses should not now be omitted.

(Woodfall, 24th ed., pp. 287–291.)

Rent Restrictions Acts—jurisdiction of county court—breach of covenant to repair—claim against statutory tenant—section 17 (2) *of* 1920 *Act.*—In *Wolfe* v. *Clarkson*, [1950] 2 All E. R. 529, the Court of Appeal, following *Lee* v. *Roberts* (1925), 159 L. T. Jo. 531, decided that a claim against a statutory tenant for breach of a covenant to repair contained in the original tenancy agreement was a claim based on section 15 (1) of the 1920 Act, and thus a claim "arising out of" that Act. Hence, by virtue of section 17 (2) of the 1920 Act, the county court had jurisdiction to deal with the claim, in spite of its amount, which was beyond the normal county court limits. The case of *A. J. Smith & Co., Ltd.* v. *Kirby*, [1947] 1 All E. R. 459, was distinguished on the ground that the claim there was a claim under a contractual tenancy. This was verified by reference to the report of the case in the *Estates Gazette* for February 22, 1947.

(Rent Restrictions Guide, 3rd ed., pp. 135–136.)

Rent Restrictions Acts—power of county court to suspend order for possession—premises suffered to be used for immoral purposes—County Court Judge's discretion.—The case of *Yates* v. *Morris*, [1950] 2 All E. R. 577, illustrates the very wide discretion vested in the County Court Judge in regard to the suspension of an order for possession. The landlord sought possession of a house subject to the Rent Restrictions Acts under section 3 (1) and paragraph (*b*) of the First Schedule to the 1933 Act, on the ground that, by suffering the premises to be used for an immoral purpose, the tenant had been guilty of conduct which was a nuisance or annoyance to adjoining occupiers. The County

Court Judge found that the landlord was entitled to possession, and made an order, but suspended it indefinitely " provided no further nuisance occurs ". He was influenced by the view that the tenant was innocent of the use made of the premises by her sub-tenants or lodgers. The Court of Appeal, with some misgiving, held that the County Court Judge had been guilty of no error of law, that he had discretion to make an order in the form in which he had made it, under section 5 (2) of the 1920 Act, and that his order was not therefore one with which the Court should interfere.

The suspended order for possession, where possession is sought on the ground of arrears of rent, is well known, but the use of such an order in the circumstances of *Yates* v. *Morris* is somewhat startling.

(Rent Restrictions Guide, 3rd ed., p. 134.)

Rent Restrictions Acts—meaning of " member of the tenant's family " under section 12 (1) (*g*) *of* 1920 *Act—" unmarried husband " not included.*—In *Gammans* v. *Ekins*, [1950] 2 All E. R. 140, the Court of Appeal refused to consider an " unmarried husband " as within the words " member of the tenant's family " in section 12 (1) (*g*) of the 1920 Act, so as to become entitled to a transmitted statutory tenancy. The test, as laid down in *Brock* v. *Wollams*, [1949] 2 K. B. 388, 395, is whether an ordinary man would regard the person in question as a member of the family. Applying that test, the Court held that such an " unmarried husband " was not, according to the ordinary use of language, a member of the deceased tenant's family.

In *Gammans* v. *Ekins*, there were no children of the irregular union, and the Court left it open whether, if there had been such children, the decision would have been different. In *Jones* v. *Truman* (1949), 99 L. J. News. 541, a County Court Judge held that an " unmarried wife ", who had borne the tenant children, was a member of his family for the purpose of section 12 (1) (*g*). Evershed, M.R., referred to this decision and, without going so far as to approve it, indicated that the existence of children of the union might suffice to justify it. If *Jones* v. *Truman* is correct, it must logically apply to an " unmarried husband " as well as to an " unmarried wife ". There must, however, be a stable and permanent union, a marriage in all but name, and there must be children of the union, before it can be said that there is a " family ".

(Rent Restrictions Guide, 3rd ed., p. 102.)

7. *INCOME TAX CASES*

By L. J. Stein, Barrister-at-Law

Income tax—income accumulated for benefit of a person on attaining a specified age or marrying—Income Tax Act, 1918, *s.* 25.—The decision of the Court of Session in *C. I. R.* v. *Maude-Roxby*, 1950 S. L. T. 255, illustrates the strict compliance with the statutory conditions which is required where it is sought to take advantage of section 25 of the Income Tax Act, 1918. The effect of that section is that repayment of income tax paid or suffered during the period of accumulation is claimable " where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying ". *Maude-Roxby's Case*, above, was concerned with a Settlement which provided that each of the Settlor's children, of whom the respondent was one, should, on attaining the age of twenty-five, become entitled to the income of a share of the settled fund. In the case of a child who had not attained that age, the income of its share, so far as not applied for its maintenance, was required to be accumulated, the accumulation to form an accretion to the capital of the share. Had this been all, the income of the respondent's share while she was under the age of twenty-five would clearly have been accumulated for her benefit contingently on her attaining that age; it would have made no difference that, on attaining the specified age, she became entitled only to the income of the fund representing the accumulations and not to the accumulations themselves—*Dale* v. *Mitcalfe* (1927), 13 T. C. 41. But her right to the income of the accumulations was not unqualified. Though from the time she attained the age of twenty-five she had, in fact, received the whole income of her share plus the accumulations, the Settlement authorised the trustees at any time to restrict the income of any of the children to such amount as they might think proper and to divert the excess in other directions. The Court had no difficulty in deciding that the claim under section 25, above, was inadmissible; in view of the discretionary power vested in and still exercisable by the trustees, it was impossible to say that the income had, within the meaning of the section, been accumulated for the benefit of the respondent.

Income tax—Dividends from shares in foreign company—Shares acquired in year one and dividend first declared in year two—

Income Tax Act, 1918, *Schedule D, Case V—Finance Act*, 1926, *s.* 30, *proviso* (*ii*).—A taxpayer who was already receiving dividends, taxable under Case V, from shares in foreign companies, acquired in the period 1932–1936 shares in another foreign company. These shares constituted a new source of Case V income. Several years, however, elapsed before any income was, in fact, derived from them. The taxpayer had to wait for his first dividend until a date in the year of assessment 1942–43. In respect of this dividend he was assessed to tax under Case V for 1942–43. He contended that the dividend was taxable, together with his other foreign dividends, on a preceding year basis, and that, accordingly, the proper year of assessment was 1943–44. This was the point at issue in *Goodlass, Wall and Lead Industries, Ltd.* v. *Atkinson*, [1950] 2 All E. R. 314. Like so many tax appeals, the case raised no question of principle but turned on latent ambiguities in ill-drafted statutory provisions. The provisions here to be considered were those of proviso (ii) to section 30 of the Finance Act, 1926. Reversing the judgment of the Court of Appeal, the House of Lords arrived unanimously at a decision in favour of the taxpayer. Though Lord Simonds concurred, he expressed some doubts, and it appears from the speeches of the other Law Lords that, looking at sections 29 and 30 as a whole, none of them found it easy to extract from the proviso to be construed a clear meaning consistent with its context. The truth seems to be that the question raised by the proviso does not admit of a wholly satisfactory answer, but, as Lord Normand observed, "in a doubtful case the Crown must fail".

Income tax—Testamentary trust for accumulation of tax free annual sum—Finance Act, 1941, *s.* 25.—A testator who died in 1936 left a will whereby (*inter alia*) his trustee was directed, for a period of twenty-one years from his death, to "set aside annually the sum of £1,500 (free of tax) from the income of the residuary trust fund and accumulate the same . . . and . . . add the accumulations to the capital of that fund . . .". Subject to this direction, the income of the residuary trust fund was payable to the tenant for life of certain settled land. These were, briefly, the facts in *Re Banbury*, [1950] 2 All E. R. 250. The question which arose was whether the tax-free annual sum of £1,500 directed to be set aside and accumulated was reducible under section 25 of the Finance Act, 1941 (as amended by section 20 of the Finance (No. 2) Act, 1945). In other words, was there in the will such a provision as is mentioned in subsection (1) of section 25, above, *viz.*, a provision

for " the *payment* . . . of a stated amount free of income tax "? In favour of the view that the £1,500 was not subject to the statutory reduction, it was argued that there was here no " payment " in the relevant sense, since the trustee would merely be placing the stated amount to a separate account in his own name. This contention was rejected by Danckwerts, J., who held that a liberal interpretation ought to be given to the language of section 25, above, and that the word " payment " in subsection (1), considered in its context, was wide enough to cover the transaction in question.

THE LIBRARY

THE LAW LIST, 1950. Edited by LESLIE C. E. TURNER. Stevens & Sons, Ltd. xxiv and 1805 pp. 17s. 6d. net.

The familiar dumpy volume this year gives way to a larger volume in demy octavo. Though many may regret this departure from tradition, there is no doubt that it has enabled the publishers to improve the work. The new type is far more readable than the old, and the inclusion of full street addresses and telephone numbers in the lists of solicitors is very welcome. It is astonishing value at the price.

CURRENT LEGAL PROBLEMS. Vol. 3 (1950). Edited by G. W. KEETON and G. SCHWARZENBERGER. Stevens & Sons, Ltd. 305 pp. 21s.

The present issue of this annual publication of the Law Faculty at University College, London, contains fifteen interesting lectures. Considerations of space must limit the present review to the four lectures of most particular concern for property lawyers. Professor Keeton sounds the swan-song of the old private gratuitous trustee and the rise of corporate trusteeship in a convincing historical canvas painted with broad and confident strokes. The effects of inflation on income trusts and wide investment clauses are discussed. A note on the American solutions of " diversification " and " cost-of-living clauses " might also have been added. Dr. Marshall highlights several of the least excusable aberrations of modern equity in a stimulating lecture. He makes the intriguing suggestion that a freehold becomes settled land if a lessee has an option to purchase. This argument might be supported by rather tortuous means, relying on *Re Flint*, [1927] 1 Ch. 570, and the rule that all options to purchase automatically involve consideration. But the present reviewer sees too many obstacles in the way of such a holding. It would mean interpreting S. L. A., 1925, s. 1 (ii) (*b*) to cover a clause of defeasance in a separate instrument from that creating the freehold limitation. It would extend *Re Flint* (*supra*) to settlements, from trusts for sale. It would confound rights of pre-emption created by a voluntary instrument with contractual options to purchase in a lease. It would be very impractical, as an option to purchase

is specifically protected by registration as a land charge and ought not to be overridden under the provisions of the S. L. A., 1925, as to the powers of an estate owner. Such protection is not available for a testamentary right of pre-emption, as not a "contract" within the L. C. A., 1925, s. 10. Mr. Lloyd's article on the Rent Acts and related legislation is first rate and a model of how useful a book of this kind can be. It should be read by every lawyer, and every landlord and tenant! Mr. Fitzgerald provides some sound criticisms of the recent planning laws, which will be echoed by many conveyancers. A very detailed account is given. Since political undercurrents are rightly stressed the learned writer might perhaps also have added some comparative notes. Thus agrarian laws in Germany forbid subdivisions of farms, like our " agricultural units ". The Dutch polders, like our " new towns ", are vested in the State. Centrally controlled machine-tractor stations in the U.S.S.R. lend heavy equipment and labour to farmers, like our county committees. Their use as local agents of enforcement of agrarian policy may explain the distrust of such loans, to which Mr. Fitzgerald refers, in this country. There are occasional misprints, *e.g.*, the first word on p. 164, and a word in line 3 on p. 168.

A. K. R. K.

The Law of Sewers and Drains. By J. F. Garner, LL.M. Shaw & Sons, Ltd. 160 pp. £1 5s.

This practical monograph deals with the law of sanitation under the Public Health Act, 1936, outside the London area. It contains a good deal of importance to the private property lawyer as well as to the local government adviser. The liability of local authorities for nuisance and negligent works is discussed, as well as the liability of the private owner for defective sanitation. The right to connect private drains to public sewers is explained, as are also the regulation of the construction of private sewers, building plans in connection with new sanitary conveniences, public powers of entry on private land to repair sewers, private obligations to contribute towards certain public works, and special shop and factory regulations. Besides sanitary matters the book refers to liability for discharge of chemicals and corrosives into the sewage system, river pollution, trade effluent, and highway water drainage. Consistent tabulation and use of varying type facilitates reading, and there is a very adequate index. The text is annotated with numerous footnotes. Although the work is best adapted for reading it can be used as a work of reference, as numerous cross

references are provided. There are one or two misprints ("statute" on p. 66 (d); "abundanti" on p. 16). The author has suggested solutions of many open problems and shows a serious interest in the subject and obvious practical experience in dealing with its legal complications.

A. K. R. K.

"STRONG'S PRACTICAL GUIDE TO SEARCHES ON DEALING WITH LAND." By C. H. OLIVER, LL.B. Second edition. Solicitors' Law Stationery Society, Ltd. pp. 170 plus xx. Price 18s. net.

This is a very useful little book for the busy conveyancer, and could be safely handed to an intelligent clerk, with the knowledge that the requisite searches in any particular transaction would then be made. We would not thus suggest that the important matter of searches is one which should not receive the personal attention of the solicitor himself, but with this book in his hand, the average clerk should be able to select and prepare the appropriate search forms without waiting for specific instructions. All the common searches are covered adequately, and useful information is included on the more unusual matters, such as searches in local government records and the register of business names. The only important omission we have noticed is the register of applications received for the display of advertisements, which is to be maintained by the local planning authority under the Town and Country Planning (Control of Advertisements) Regulations, 1948. The author, no doubt, considers that the register required to be maintained under section 13 (2) of the Private Street Works Act, 1892, is now obsolete in view of the provisions of the Land Charges Act, 1925, but the 1892 Act section has never been repealed.

We are not sure that the author has said the last word on the question of the enforceability of charges registrable in Parts VI–X of the local land charges register (see p. 34); we incline to the view expressed in an article in the *Solicitors' Journal* (July 23, 1949, at p. 477), rather than that referred to in the text. The author, following accepted professional practice, prefers official to personal searches at the Land Registry in the case of registered land. Whilst it is agreed that the official search cannot be dispensed with, it is perhaps regrettable that practitioners do not more frequently carry out a personal search, which would often avoid mistakes in identity of the property, or subsequent disputes as to boundaries.

The book seems to have been carefully prepared, and we have observed only one slip, on p. 113, where rule 11 (1) (*b*) of the Local Land Charges Rules, 1934, is printed without one of the

amendments made by the 1938 Rules. Prints are included in the book of the relevant sections of the 1925 property legislation, the Land Charges Rules, the relevant provisions of the Land Registration Rules, a consolidated version of the Local Land Charges Rules, 1934, and the four sets of rules dealing with Parts VI–X of the local land charges register.

J. F. G.

DYMOND ON DEATH DUTIES. Tenth Edition, Third (Consolidated) Supplement to December 31, 1949. London : Solicitors' Law Stationery Society. 10s. 6d.

Dymond on Death Duties has an established reputation for reliability, and the latest Supplement has been prepared with the same painstaking care as the main work. The usual practice in the case of such Supplements is to take the textbook page by page and provide, as it were, a series of footnotes. It has, however, been thought—and there is much to be said for this view—that, having regard to the extensive changes which have recently been made in the law relating to death duties, Dymond could more conveniently be brought up to date by a Supplement departing from the conventional form. There is first a consecutive discussion of each of the main topics requiring to be dealt with, and this is followed by an elaborate table of amendments to the main work, accompanied in each case by a reference to the page at which the explanation will be found. To this is added the text of the relevant legislation, including the Double Taxation Agreements with Canada and South Africa. Due note is taken of decisions up to the end of 1949, and there are references to such recent judgments as those in the *Fitzwilliam* and *Duke of Norfolk Cases* and the two *St. Aubyn Cases*. It may be mentioned in passing that, speaking of *Re St. Levan, Att.-Gen.* v. *St. Aubyn* (on which the author comments mildly that "the judgment is not easy to understand"), he refers only to a short note in "The Accountant" and does not mention the full report in 1949 T. R. 229. On the subject of section 43 of the Finance Act, 1940, the main work contained some rather startling illustrations of what was then considered to be the operation of that section. Those concerned with its none too clearly drafted provisions will be grateful to the Supplement for explaining the effect, in the case of each example, of the Revenue authorities' second thoughts on the subject. Dealing with the interesting judgment in *Re Miller's Agreement*, [1947] Ch. 615, the Supplement rightly

draws attention to the fact that that decision has been adversely criticised by Denning, L.J., in *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board*, [1949] 2 K. B. 500. Space does not permit of more extended comment. Suffice it to say that the Supplement brings up to date, as nearly as is humanly possible, a textbook of acknowledged merit and does so in full conformity with its high standards.

L. S.

THE DOUBLE TAXATION CONVENTIONS. By F. E. KOCH. Supplement to Volume I, Taxation of Income. Stevens. 25s. net.

Volume I of Koch on *The Double Taxation Conventions* was immediately recognised as a valuable and, indeed, indispensable addition to the tax practitioner's library. Since its publication in 1947, some new Conventions have been negotiated and there has been time to gain some experience of administrative practice in the matter of double taxation relief. The Supplement which has now appeared brings the work up to date as at the end of 1949. The new matter includes the text, with full commentary, of the Conventions with New Zealand, the Netherlands, Sweden, the Republic of Ireland and various British overseas territories. The Convention with Israel, continuing the arrangements made with the mandatory Administration of Palestine, was published too late to be included. In the handling of somewhat intractable subject-matter the Supplement is as thorough and reliable as the main work, and no higher praise can be required. Volume I and the Supplement thereto deal with the income tax aspect of double taxation relief. It is to be hoped that the appearance of Volume II, which is to deal with the death duties aspect, may not long be delayed.

L. S.